DOCUMENT RESUME

ED 347 635 EA 024 073

TITLE	EPA's Administration of the Asbestos in Schools Program. Hearing before the Environment, Energy, and Natural Resources Subcommittee of the Committee on Government Operations. House of Representatives, One Hundred Second Congress, First Session (September 24, 1991).
INSTITUTION	Congress of the U. S., Washington, D. C. House Committee on Government Operations.
REPORT NO	ISBN-0-16-038335-8
PUB DATE	92
NOTE	179p.; Some faint small print on p49-55 and broken print on p123-125 may not reproduce adequately in paper copy.
PUB TYPE	Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01/PC08 Plus Postage.
DESCRIPTORS	*Asbestos; Compliance (Legal); Construction Materials; Elementary Secondary Education; Federal Government; *Federal Regulation; *Hazardous Materials; *Program Effectiveness; School Safety
IDENTIFIERS	*Asbestos Hazard Emergency Response Act 1986; *Environmental Protection Agency

ABSTRACT

Proceedings of a hearing concerning the Environmental Protection Agency's (EPA's) administration of the Asbestos in School Program are presented in this report. Specifically, the hearing's purpose was to examine the EPA's progress in implementing the Asbestos Hazardous Emergency Response Act (AHERA), wherein the agency was responsible for providing guidance regarding the removal of asbestos from public schools. The report contains statements, letters, and testimonies of EPA and AFL-CIO representatives, and Hall-Kimbrell Environment Services, a company fined by the EPA for failure to consider sheetrock and hard plaster wall systems as potential containers of asbestos. Details are provided about the passage of AHERA and its requirements, the Canadian wallboard issue, and the EPA's "100 Questions" document released to schools. (LMI)

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EPA'S ADMINISTRATION OF THE ASBESTOS IN SCHOOLS PROGRAM

HEARING

BEFORE THE

ENVIRONMENT, ENERGY, AND NATURAL RESOURCES SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

SEPTEMBER 24, 1991

Printed for the use of the Committee on Government Operations

U.S. GOVERNMENT PRINTING OFFICE
53-613 ⇔ WASHINGTON : 1992

EA 024073

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EPA'S ADMINISTRATION OF THE ASBESTOS IN SCHOOLS PROGRAM

TUESDAY, SEPTEMBER 24, 1991

House of Representatives,
Environment, Energy,
and Natural Resources Subcommittee
of the Committee on Government Operations,
Washington, DC.

The subcommittee met, pursuant to notice, at 9 a.m., in room 2154, Rayburn House Office Building, Hon. Mike Synar (chairman of the subcommittee) presiding.

Present: Representatives Mike Synar, Charles J. Luken, John W. Cox, Jr., William F. Clinger, Jr., and David L. Hobson.

Also present: Sandra Z. Harris, staff director; Ruth Fleischer, counsel; James Aidala, professional staff member; Elisabeth Campbell, clerk; Matthew R. Fletcher, minority deputy staff director, Committee on Government Operations; and Rich Chervenak, GAO detailee.

OPENING STATEMENT OF CHAIRMAN SYNAR

Mr. **Synar**. The subcommittee will come to order. Today, the subcommittee will examine EPA's progress in implementing the Asbestos Hazardous Emergency Response Act [AHERA]. The timing of our review is coincidental with the beginning of the school year, but it seems to be an appropriate backdrop for an examination of the Asbestos in Schools Program.

A program of vital interest to thousands of schools and millions of students, teachers, workers, and parents around the Nation, AHERA required that the Nation's 40,000 local education agencies [LEA's] inspect all school buildings within their jurisdictions for asbestos-containing materials. Based on these inspections, LEA's were required to develop management plans specifying how they were going to deal with any asbestos found and submit such plans to their appropriate State agency.

The subcommittee's two sessions today will examine the adequacies of EPA'S AHERA regulation, the effectiveness of the Agency's enforcement program, the adequacy of the management plans prescribed by EPA regulations and submitted to the State, and how EPA's experience with the Asbestos in Schools Program may affect the Agency's upcoming decision with respect to asbestos in public and commercial buildings.

Because events prompting certain pending EPA enforcement actions, as well as the outcome of these cases, may have serious policy and administrative implications for the AHERA program and they may have significant consequences for LEA's across the country, our hearing will in part examine EPA's enforcement effort.

In view of the important health and environment issues at stake in our Asbestos in Schools Program and the financial burden this program has imposed on so many schools, our oversight responsibility to the House requires that this subcommittee thoroughly understand these events as well as their implications for the future. At the same time, the subcommittee must be sensitive to the rights of parties involved as well as the ongoing enforcement responsibilities of the Agency.

Accordingly, we will soon entertain a motion to go into closed session for purposes of receiving testimony on these enforcement questions. Now, I believe it's important and appropriate to reiterate at this point that the subcommittee's inquiry is not designed or intended to influence the pending enforcement action by EPA. Rather, our sole purpose is to gain a thorough understanding of certain events which raise concerns of utmost importance to this subcommittee.

Following that closed session, which may be as short as a half an hour, the subcommittee will take a short break and reconvene in open session. At that time, we will begin an examination of EPA's overall administration of this program, including certain enforcement related matters to the extent that they may be properly discussed in open session.

Mr. Clinger.

Mr. CLINGER. Thank you very much, Mr. Chairman. Mr. Chairman, a few years ago I joined with you in reviewing the Asbestos School Hazard Abatement Act, an act providing funds to financially needy public and private schools for asbestos abatement projects. As you will recall, one of my primary concerns at that time was that rural and smaller school districts not be shortchanged in receiving the program's grants or loans.

Today, my concern is for all of the school districts that may have been shortchanged in the inspections and management plans they paid for as required by the Asbestos Hazard Emergency Response Act. While I am reserving judgment until we hear from today's witnesses, I'm beginning to get the feeling that once again the local education areas are the big losers. Once again, a program that was enacted with the best of intentions has resulted in tremendous costs, increased risks, and incredible waste, all to be shouldered by school districts struggling to provide their students with a quality education.

Mr. Chairman, I appreciate the long-term commitment you have made to overseeing the AHERA program and appreciate you convening today's hearing. I would also like the record to show that the subcommittee was assisted in its preparation for today's hearing by one of my constituents, Mr. Francis Brown of State College, Pennsylvania. Mr. Brown, who inspected a prepared management plan for at least 45 public and private schools in Pennsylvania, was kind enough to explain to the subcommittee staff in detail how management plans are prepared.

In addition, the subcommittee extends its thanks to the school board, superintendent of schools, and high school principal, John Bernard; and middle school principal, Robert Williams, of the Northern Cambria School District in Barnesborrow/Spangler, PA, for allowing Mr. Brown to show the subcommittee staff, room by room, how AHERA inspections were conducted. Cooperation of Mr. Brown and the school district was instrumental in allowing the subcommittee to understand how the AHERA regulations apply in practice.

Thank you, Mr. Chairman.

Mr. SYNAR. Mr. Cox.

Mr. Cox. Thank you, Mr. Chairman. I want to thank you and the subcommittee for the foresight in addressing the issue before us today. The situation before us is perhaps one of the most potentially disturbing in my short term on this subcommittee. I commend you for providing the people of this Nation with the responsible leadership they deserve.

The subcommittee has brought to light some very disturbing information regarding the removal of asbestos from our Nation's schools. Congress has expressed the urgency of asbestos removal from our schools with the passage of the Asbestos School Hazards Abatement Act in 1984 and the Asbestos Hazard Emergency Response Act in 1986.

Through this legislation, Congress directed the EPA to work toward the timely evaluation of asbestos problems and establish legitimate management plans to ensure safety in our schools. Unfortunately, the evidence seems to indicate that the EPA has either not taken their function in this process seriously enough or simply has proven incompetent. If the allegations against EPA's performance are true, it has failed to provide the needed guidance to those involved in the process.

Congress had deemed the EPA responsible for the guidance needed, and its failure to provide it is simply not acceptable to this subcommittee, to the Congress and, most of all, to the people of this country it is employed to serve. The problems are magnified when EPA decides to file suit against those seeking guidance from EPA, when those accused claim they attempted to follow guidelines but EPA would not provide them when requested.

This practice makes no sense whatsoever and is unfair to all parties involved. In many cases, EPA has suggested that the previous inspections of schools are not adequate and another inspection was needed. In most cases, it seems it is the local schools who will ultimately bear the economic burden of another inspection—a burden many cannot bear. It almost seems as though there are no good guys in this situation.

To my understanding, EPA plans to use their efforts in the evaluation and removal of asbestos from schools as a guideline for the private sector. There are thousands of private buildings which, no doubt, have asbestos exposure problems that need to be addressed as soon as possible. However, considering the past record of EPA involvement, I sincerely hope EPA addresses the major problems in the process before extending the current programs. I am confident that this hearing will be of some assistance in that regard.

In closing, Mr. Chairman, I think it's important that we keep in mind just what is at stake here. It has been proven that the fibers from asbestos used in thousands of structures across this country, including thousands of schools, pose extreme health risks. If inhaled, it has been proven these fibers can cause very serious health problems as potentially fatal as lung cancer.

To sit here today and consider the possibility that we are exposing our children to such potentially life threatening situations because of the possibility that a Federal agency has failed to do its job is inexcusable and cannot be tolerated. I do not believe it is too much to ask for the Government to do the job it was created to do, and that is protect the people of this Nation; that's why we are here today. Mr. Chairman, I look forward to working with you in this regard. Thank you.

Mr. SYNAR. Mr. Luken.

Mr. LUKEN. Mr. Chairman, I just want to add my congratulations to you on convening this most important hearing. I'm anxious to listen to the testimony today and subsequent hearings. I know with your leadership this is just not a one-time thing. Your follow-through has been demonstrated time and time again. Like Mr. Cox, I look forward to working with you on this most important subject.

Mr. SYNAR. Mr. Cox, for a motion?

Mr. COX. Mr. Chairman, pursuant to clause 2G-1 of rule 11, I move that the subcommittee go into closed session for the purpose of receiving executive session testimony with respect to certain pending enforcement matters.

Mr. SYNAR. The clerk will call the roll.

Ms. CAMPBELL. Mr. Towns.

[No response.]

Ms. CAMPBELL. Mr. Bustamante.

[No response.]

Ms. CAMPBELL. Mr. Erdreich.

[No response.]

Ms. CAMPBELL. Mr. Luken.

Mr. LUKEN. Aye.

Ms. CAMPBELL. Mr. Cox.

Mr. COX. Aye.

Ms. CAMPBELL. Mr. Clinger.

Mr. CLINGER. Aye.

Ms. CAMPBELL. Mr. Hobson.

Mr. HOBSON. Aye.

Ms. CAMPBELL. Mr. Klug.

[No response.]

Ms. CAMPBELL. Mr. Synar.

Mr. SYNAR. Aye.

The clerk will report.

Ms. CAMPBELL. The ayes are five, the nays are zero.

Mr. SYNAR. Under the rules, a majority quorum being present, we will move into executive session. We would ask all those who are present here to step outside of the room. It should be no more than 45 minutes, and we'll be back into open session. And we will keep it posted on the board when we expect to come back in.

We are recessed until that time.

[Whereupon, the subcommittee proceeded in executive session.]

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Mr. **Synar**. The subcommittee will come to order.

The subcommittee today continues its reviews of EPA's Asbestos in Schools Program. When we last reviewed this topic in June 1988, I closed the hearing by expressing my concern about whether our schools were getting the quality inspection work they needed and whether the States were properly equipped to carry out the role assigned under the Asbestos Hazard Emergency Response Act. The results of our latest review have not allayed my fears.

We have now lived with AHERA for almost 5 years. The first round of asbestos inspections has now been completed, and local education agencies [LEA's] have now put in place asbestos management plans for literally thousands of schools across the country. Indeed, we are now in the midst of the first triennial reinspection period.

The question today is the extent to which we know if the original inspections, upon which existing management plans are based, clearly identify asbestos-containing materials so that schools could deal with the risk intelligently and efficiently.

Unfortunately, it appears that we do not yet know the scope of these potential deficiencies. As a result, LEA's and individual schools are faced with two equally unfortunate prospects. On the one hand, deficient but uncorrected plans may pose needless risk to students, teachers, and workers, and the required reinspection of those plans would be meaningless. On the other hand, correcting deficient plans will impose significant and unexpected financial burdens on many schools.

Moreover, if deficiencies in some school's plans are as serious as EPA claims, the Agency should have never waited over 2 years to notify the affected schools. As a practical matter, any school with a plan that failed to identify asbestos-containing material may have needlessly subjected children, teachers, and workers to hazardous asbestos fibers during renovation or construction projects. The point of this law was to avoid these risks.

We will also examine certain enforcement-related matters, including events surrounding EPA's largest case involving a company which inspected and prepared management plans for 1,300 LEA's involving 45,000 school buildings in 47 States—fully 7 to 10 percent of our Nation's school buildings.

At the heart of this enforcement controversy is whether or not wallboard, the most prevalent material in buildings, should have been inspected to determine the presence of asbestos. The outcome of this and similar enforcement cases may have significant consequences for thousands of schools across the country and, ultimately, the health of thousands of students, teachers, and workers who are in our school buildings day after day.

We are back here for the second time in 3 years with serious questions about EPA's effectiveness in implementing and overseeing the Asbestos in Schools Program. I hope this hearing will spur EPA into making whatever programmatic or regulatory changes are necessary to ensure an effective, efficient asbestos program.

Should the consensus be that Congress must revisit the law itself, then my hope is that EPA will clearly identify statutory improvements it believes may be necessary so that we can do our share to improve the administration of this vital public health program.

The Asbestos in Schools Program effects every community in this country and is designed to protect the most vulnerable segment of our society—our kids. In short, the program is simply too important for us to ignore these potentially serious problems.

Our first panel this morning will be Linda J. Fisher, Assistant Administrator for Pesticides and Toxic Substances, U.S. Environmental Protection Agency. She is accompanied by Michael Stahl, Director of the Office of Compliance and Monitoring; David Kling, Acting Director of the Environmental Assistance Division, Office of Toxic Substances; Michael Walker, enforcement counsel for Pesticides and Toxic Substances; and Wolfgang Brandner, regional asbestos coordinator, region VII; and a host of other people. I hope there is no train wreck in California this morning.

I'm going to swear you all in again. We did it in closed session, but I think it's important that we swear you in again in open session.

Ms. Fisher. Maybe it will take better the second time.

Mr. Synar. I want anybody who could potentially testify or assist in the testimony to be sworn in, just the EPA.

[Witnesses sworn.]

Mr. Synar. Ms. Fisher, welcome back, and at this time we look forward to your testimony.

STATEMENT OF LINDA J. FISHER, ASSISTANT ADMINISTRATOR FOR PESTICIDES AND TOXIC SUBSTANCES, U.S. ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY MICHAEL STAHL, DIRECTOR, OFFICE OF COMPLIANCE MONITORING; DAVID KLING, ACTING DIRECTOR, ENVIRONMENTAL ASSISTANCE DIVISION, OFFICE OF TOXIC SUBSTANCES; MICHAEL WALKER, ENFORCEMENT COUNSEL FOR PESTICIDES AND TOXIC SUBSTANCES; AND WOLFGANG BRANDNER, REGIONAL ASBESTOS COORDINATOR, REGION VII

Ms. Fisher. Thank you, Mr. Chairman. I appreciate the opportunity to testify before you this morning to discuss our progress in implementing the Asbestos Hazard Emergency Response Act, or AHERA.

AHERA provides a comprehensive framework for controlling asbestos exposure and reducing risks in our Nation's schools. We believe that the prevailing levels of asbestos in schools are low, and therefore, the risks to school children from exposure to asbestos are also very low. The AHERA program was designed as a preventive one, established to keep low levels of asbestos low through proper identification and management of asbestos.

AHERA was signed into law on October 22, 1986. EPA was given 1 year to promulgate the regulations which would require local education agencies to inspect school buildings for asbestos, to develop management plans, and implement response actions. The statute also requires persons other than the schools to comply with the requirements of AHERA or any rule or order issued under AHERA, and it sets forth very ambitious deadlines by which the schools had to comply with AHERA requirements.

The Nation's schools faced challenging schedules if they were to be in compliance with AHERA. Originally, they were allowed until October 1988, or 1 year after the EPA regulations were published, to complete their inspections and submit their management plans to their States. This date was later amended by Congress to May 1989 because some schools had difficulty finding accredited personnel for inspection and planning.

Because of the tight timeframes, the Agency developed its AHERA proposed rule through a negotiated rulemaking process. It included representatives from the various education agencies, workers, industry, public health and environmental groups. Representatives from these groups helped us ensure that the protection intended by AHERA was afforded but in a manner which minimized costs and other burdens associated with school implementation and compliance.

The primary goals of EPA have been to get full participation by the schools in AHERA, get high quality inspections and management plans, and to have those plans thoroughly implemented. Therefore, the Agency has attempted to include any party that would be affected by AHERA through all aspects of the creation and implementation of the program.

We have created a model accreditation plan for the training and accreditation of AHERA inspectors, planners, abatement contractors supervisors, and workers in order to develop the infrastructure necessary to ensure that AHERA inspections and management plans were of good quality. Since they were designated under AHERA to receive the school plans, EPA also worked with the States to improve their ability to assess the contents and the quality of the plans and make informed decisions to accept them or reject them.

States began to work with LEA's immediately upon reviewing their plans to get improvements where those were needed. Throughout the life of this program, EPA has conducted a comprehensive outreach program and technical assistance efforts with the LEA's which consisted of model training materials, guidance documents, a series of direct mailings to help the schools fully understand and comply with the requirements and regulations of AHERA. These efforts continue today.

With an interest in continuous improvement, the Agency began a self-evaluation of the AHERA Schools Program in February 1988. The goal was to identify any problems with the program and correct them in time for the triennial reinspection which began this summer. Specially selected and trained inspectors thoroughly reinspected each school building in a nationally statistical sample and their findings were compared with the original AHERA inspection as reported in the school's management plan.

The evaluation told us that the schools have taken important initial steps to identify and control asbestos in their buildings, although several important program elements do need improvement. The schools, for instance, generally scored high on the two most important criteria for the asbestos inspection, the identification and assessment of asbestos.

For example, they identified about 90 percent of the total amount of suspect asbestos-containing material which the evaluation addressed in their buildings, as well as more than two-thirds of the individual types of asbestos material. About 92 percent of the asbestos-containing material that should have been assessed, according to AHERA, were assessed properly.

Overall, about 62 percent of the inspections from our perspective were basically quite good and we would characterize them as receiving an "A" or a "B." Seventeen percent of the inspections could be graded as a "C." These were basically sound but do need improvement in some of the important areas. Twenty-one percent of the inspections could be graded as a "D" to an "F." And although there is a wide range in this category, when compared to EPA's rigorous inspection standard, all of this group needed much improvement.

The evaluation also showed that schools are not conducting wholesale unnecessary removals. In fact, only about 16 percent have had any portion of the response plan include a removal.

An area of particular concern was the evaluation of custodial and maintenance worker training. Although most custodians, about 95 percent, received the 2 hours of asbestos awareness training required by AHERA, many maintenance workers, about 74 percent, have received considerably less than the 16 hours of training required by AHERA.

The nature of these people's work may cause them to come into contact with asbestos if they are not properly trained, and therefore expose themselves as well as students or teachers to more asbestos than necessary.

Based on the evaluation's findings, both the school and EPA need to take additional actions. First, the schools should carefully examine the AHERA factsheet, which is now in their hands, as they begin the AHERA reinspection process. It provides a number of general tips based on the AHERA evaluation findings for improving their school management program. Secondly, the upcoming AHERA reinspection process is a perfect opportunity for the schools to improve their inspections and management plans.

EPA has initiated or planned several activities to address some of the shortcomings that were identified in the evaluation. EPA has strengthened our reinspection guidance and our technical assistance activities with specific focus on the problem areas. We are now in the process of developing detailed guidance on how to conduct an AHERA reinspection and are developing a number of manuals and other materials for school custodians, workers, and officials. EPA is also considering a limited AHERA rule revision and is in the process of revising our model accreditation plan for the States.

To ensure that contractors and LEA's were meeting their responsibilities under AHERA, EPA published its AHERA compliance strategy in October 1988. By using this strategy, EPA sought to use compliance monitoring and enforcement activities to work with the parents, teachers, school workers, and school officials to improve asbestos management plans and see that they were and are being effectively implemented. Our first goal was to get the school to do an inspection and to develop a management plan in accordance with the statute's timeframes. We therefore targeted our enforcement efforts at those schools which failed to submit a management plan, based on the reports that we received from the States. Our second priority was to focus on the quality of the work that was done by the contracting firms. A number of cases have been brought on the national, regional, and State level for violations of AHERA. In seeking settlement of in court decisions in the majority of the cases our emphasis has been to seek improved compliance rather than just monetary penalties.

Since the goal of these enforcement actions was to guarantee good management plans for the schools, settlements have often provided that the respondent would conduct reinspection at the schools in question to identify the missed material and to amend the management plans where necessary.

EPA believes that the AHERA Schools Program has made a real contribution to keeping exposure to asbestos low. The inspections and the management plans, although in need of improvement, are important preventative steps to help ensure that the prevailing low levels of asbestos in schools remains so. We intend to continue our program based on a considerable amount of technical assistance and communication with all of the involved parties, as well as strong enforcement to ensure that the proper management of asbestos continues.

I appreciate this opportunity to testify on our program, and I would be glad to answer any of your questions.

[The prepared statement of Ms. Fisher follows:]

STATEMENT OF
LINDA J. FISHER
ASSISTANT ADMINISTRATOR
FOR PESTICIDES AND TOXIC SUBSTANCES
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON ENVIRONMENT, ENERGY, AND NATURAL RESOURCES
COMMITTEE ON GOVERNMENT OPERATIONS
U.S. HOUSE OF REPRESENTATIVES

SEPTEMBER 24, 1991

Mr. Chairman and members of the Subcommittee, I want to thank you for the opportunity to appear before you today to discuss progress in implementing the **Asbestos Hazard Emergency Response Act (AHERA)**, which provides a comprehensive framework for controlling asbestos exposure and reducing risk in our nation's schools.

Primarily, I would like to share with you the results of a major evaluation of the AHERA program, initiated by the Agency two years ago and completed this summer, and to discuss the steps we are now taking both to improve our schools program and to assess the need for similar requirements in public and commercial buildings.

I. EPA AND ASBESTOS IN SCHOOLS

The Federal government has been regulating asbestos for a number of years, with special school activities beginning in the late 1970s. In May 1982, EPA promulgated a rule under the Toxic Substances Control Act (TSCA), the Asbestos-In-Schools Identification and Notification Rule, which required all schools to inspect for friable (easily crumbled) asbestos and to notify parents, teachers and workers of their findings. Congress passed the Asbestos School Hazard Abatement Act (ASHAA) in 1984 to provide funding assistance to those schools with the most serious hazards and the greatest financial need. Since 1985, the ASHAA loan and grant program has provided about $291 million to more than 1,100 needy school districts or private schools to help them abate serious asbestos hazards. AHERA, and its various support programs and activities, followed in 1986.

The Agency, during this period, has offered a wide variety of guidance and technical assistance on asbestos, largely through the publication and distribution of documents like our "Green Book," "Managing Asbestos in Place," and many specific materials to help schools understand and comply with the AHERA school rule. Additionally, each of the Agency's 10 regions has a Regional asbestos coordinator with a staff of technical experts, hired through our program with the American Association of Retired Persons (AARP), who provide advice to thousands of school officials and building owners.

We have also taken many opportunities to clarify the Agency's policies and requirements for asbestos control in schools and in public and commercial buildings. Our basic asbestos policy is perhaps best summarized by our "five facts," which has been the subject of recent congressional testimony and an advisory from EPA Administrator William Reilly and mailed directly to all schools. In particular, it bears repeating that, for most situations, EPA under the AHERA program **does not** mandate removal of asbestos. The AHERA regulations allow the school to decide whether asbestos removal, or some other response action such as encapsulation, enclosure, or repair is the best option to protect the health of school students and employees. The AHERA regulations do not require removal of asbestos material unless the material is significantly damaged and then only if other actions will not control fiber release. This position was recently recognized by the American Medical Association's Council on Scientific Affairs.

Although asbestos _is_ hazardous, human risk of asbestos disease depends upon exposure. The prevailing asbestos levels in buildings -- the levels that school children, and you and I face as building occupants -- seem to be very low, based upon available data. Accordingly, the health risk we face as building occupants also appears to be very low. The principal objective of the AHERA program is to keep asbestos levels low in schools.

In addition, removal is often _not_ a school district's or other building owner's best course of action to reduce asbestos exposure. In fact, an improper removal can create a dangerous situation where none previously existed. Instead of removal, a conscientious in-place management program will usually control fiber releases, particularly when the materials are not significantly damaged and are not likely to be disturbed. EPA _does_ recommend in-place management whenever asbestos is discovered.

II. AHERA SCHOOL REQUIREMENTS AND IMPLEMENTATION

AHERA was passed by Congress on October 3, 1986, and signed into law by President Reagan on October 22, 1986. The law directed EPA to issue very specific regulations that require public and non-profit private elementary and secondary schools to inspect their buildings for all asbestos, to develop management plans, and to implement appropriate "response" actions to control exposure and reduce risk. AHERA also required schools to use specially-trained and accredited personnel to carry out these inspection, management planning and abatement activities.

The Agency developed its AHERA proposed rule through a negotiated rulemaking, which included representatives from various education, worker, industry, public health and environmental groups. Representatives from these groups helped us ensure that the protection intended by AHERA were afforded, but in a manner which minimized the costs and other burdens associated with school implementation and compliance. (Some of these groups later intervened on the Agency's side when we successfully defended a judicial challenge on the AHERA schools rule by former asbestos manufacturers.)

EPA's AHERA school rule, in accordance with the law, requires:

- An accredited inspector to visually inspect the entire school and to identify and record the location of all asbestos-containing building materials -- both friable and nonfriable.

- An accredited planner to develop a management plan, which includes inspection results, an operations and maintenance, or in-place management, program for any friable asbestos materials, and descriptions of preventative measures and response actions to be taken.
- School officials, in consultation with their accredited planners, to select appropriate, yet least burdensome, response actions to protect human health and the environment. These actions include operations and maintenance, repair, encapsulation, enclosure or removal of the material.
- Implementation of the plan by schools, which includes:
    - scheduling and conducting response actions,
    - proper training and protection for service and maintenance workers, and
    - availability of the plan to service workers, parents and teachers, who were to be notified of its presence.

Finally,

- Surveillance every six months by school personnel and formal reinspection of known materials every three years by accredited inspectors.

AHERA established very ambitious deadlines for EPA and the schools to implement this program. EPA was required to issue a Model Accreditation Plan for states for the training and accreditation of AHERA inspectors, planners, abatement contractor supervisors and workers by April 1987. EPA was also required to promulgate its final AHERA regulations, described above, within one year -- by October 1987. The Agency met both these deadlines.

The nation's schools faced equally challenging schedules. AHERA originally allowed schools one year after the EPA regulations were complete -- until October 1988 -- for completing inspections and submitting management plans to their states. Congress later amended AHERA to permit extra time, until May 1989, for those schools unable to find accredited personnel for inspection and planning, although the Act's initial deadline of July 1989 for the implementation of AHERA management plans was not changed. The Agency, beginning in late 1987, conducted a comprehensive outreach and technical assistance effort for AHERA, which included the development and dissemination of model training materials, several new guidance documents on the new AHERA schools rule, a national teleconference and a series of direct mailings to schools.

By December 1989, the states, which were designated under AHERA to receive school management plans, reported to EPA that approximately 94 percent of all public school districts and non-profit private schools had completed inspections and developed plans. After nearly two more years of hard work by EPA, states, and the schools, this figure has risen to 97 percent. While we were obviously pleased with the schools' success in meeting these two initial requirements of AHERA, we lacked reliable, nationwide information on the quality of the AHERA school inspections and plans which was subsequently provided by the AHERA evaluation.

III. AHERA EVALUATION

EPA first announced its intention to evaluate the AHERA schools program in February 1988, while schools were conducting their AHERA inspections. This evaluation was one of several activities highlighted in the EPA Study of Asbestos-Containing Materials in Public Buildings. EPA initiated the evaluation on its own to identify possible improvements in the schools program and to help determine the need for similar requirements in public and commercial buildings.

Methodology

The evaluation focused on how well the schools implemented key aspects of AHERA -- inspections, management plans, response actions and custodial/maintenance worker training. It was conducted in a national statistical sample of 30 communities, involving 198 schools and 207 school buildings. Specially selected and trained inspectors thoroughly reinspected each school building, and their findings were compared with the original AHERA inspection as reported in the school's management plan. In addition, in-person and telephone interviews were held with school officials, principals, teachers, accredited school inspectors, National PTA members, as well as custodial and maintenance workers.

EPA announced the AHERA evaluation results on July 30, 1991, and has mailed fact sheets on the evaluation findings directly to the nation's schools. The findings are particularly timely now for schools, which must conduct their AHERA reinspections over the next year. The school can use the findings of the AHERA evaluation along with specific recommendations to improve the quality of their reinspections and asbestos management activities.

Evaluation Results

Overall, we found that **schools have taken important initial steps to control asbestos in their buildings, although several important program elements will need continuing improvement.** Further, the **vast majority of school officials have decided upon a course which is consistent with EPA's in-place management philosophy.**

Schools generally scored high on the two most important criteria for an asbestos inspection -- **identification** (knowing where the material is) and **assessment** (knowing its condition, or tendency to release fibers). For example, school inspections identified about 90% of the total amount of suspect asbestos-containing material which the evaluation addressed in their buildings, as well as more than two-thirds of the individual types of asbestos materials. Also, 92% of the asbestos-containing materials that should have been assessed according to AHERA were assessed appropriately.

Ninety percent of the recommended response actions in school management plans involve **managing asbestos in place** rather than removing it. Most schools are not conducting wholesale removals.

In fact, only 16% of the school buildings in the survey have had any portion of the asbestos-containing materials removed. Nearly all the recommended response actions (98%) were deemed appropriate, although 80% of the recommendations were very general and often failed to specify the exact locations where the response action should be performed.

In addition, a survey of school principals showed that parents and teachers did not appear to overreact upon learning about the presence of asbestos in their schools. This is good news, since overreaction sometimes leads to improper or poorly conducted removals, which can increase exposure and risk.

The AHERA evaluation, however, identified several important areas for improvement, including asbestos inspection quality. During the evaluation's inspection reassessments, we established a rigorous standard against which original AHERA inspections in schools were rated. This rigor was imposed to help EPA and the school community understand how closely the standard AHERA school inspection compared to the "ideal" inspection. To accomplish this, we conducted very thorough inspections with only highly trained and experienced asbestos professionals, and all the individual elements of the inspections, such as sampling and material quantification, were carefully controlled, uniform and precisely measured.

The original AHERA inspections can be divided into four general categories and can be scored or "graded" by employing four major rating components:

- Was the suspect material properly identified?
- Was the material assessed correctly?
- Did the inspector locate at least 80% of the material?
- Did the inspection correctly quantify at least 80% of the material?

Overall, 62% of the original AHERA inspections were basically good and could be characterized as "A" or "B" grades. Of this number, 16% were very thorough, in that they satisfied all four of the key rating components. The remaining 46% satisfied the two most important factors, identification and assessment, but failed to either exactly quantify or locate all the material.

Another 17% could be graded as "C" inspections -- basically sound, but requiring improvement in important areas. For example, while these inspections also satisfied the two most critical factors, they failed to both accurately quantify and successfully designate the location of all the material.

Finally, and of most concern, 21% of the inspections were scored "D" to "F" when compared to EPA's "ideal" inspection standard. These inspections failed to identify or assess materials properly, sometimes both. In addition, they may not have quantified or located materials properly.

As I will discuss shortly, we have begun a number of AHERA program improvement activities to assist schools in their required AHERA reinspections, which will give them an opportunity to improve their "grades."

Another key area for improvement is custodial and maintenance worker training. Although most custodians (95%) received the two hours of asbestos awareness training required b AHERA, many maintenance workers (74%) received less than the 16 hours of training required for those who come in contact with asbestos. Furthermore, discussions with some of these workers suggest that they may frequently engage in unprotected or inappropriate work practices.

We also found that school AHERA management plans were not as easy to use as they should be. For example, 69% of them lacked a table of contents, page numbering, floor plans or other features which impede use.

IV. IMPROVING THE AHERA PROGRAM

EPA has already taken important steps to address the major concerns identified in the AHERA evaluation, and several other activities are underway or being planned. They can be described under four general categories:

- AHERA reinspection guidance and other technical assistance.
- AHERA compliance and enforcement actions.
- Considering limited AHERA rule revision.
- Model accreditation plan modification.

Reinspection Guidance and Other Technical Assistance

Under AHERA, school buildings must be reinspected every three years. The first triennial reinspection must occur within three years after implementation of a school's management plan is in effect. Therefore, the first round of reinspections must be completed by July 9, 1992.

As part of our continuing AHERA technical assistance activities, EPA has already:

- provided an AHERA reinspection question and answers document to all schools to help them plan and conduct the reinspections required by AHERA. It clarifies the responsibility of schools in this activity.
- distributed to all schools a fact sheet on the AHERA evaluation findings, and what those findings mean for asbestos management in schools.
- conducted seminars across the country on the Agency's Green Book, Managing Asbestos In Place, which was also mailed directly to schools.

In addition, we are also:

- developing detailed guidance on how to conduct an AHERA reinspection, set for publication this winter. The document will define AHERA reinspection requirements and EPA recommended procedures. It will alert schools to look for materials commonly missed in the initial AHERA inspection and identify other ways which schools can improve their inspection "grades." For example, reinspection is an opportunity for schools to have the original inspection report reviewed and corrected, should there be deficiencies in the identification and assessment of asbestos-containing materials.

- preparing model materials, due early next year, for the 16-hour maintenance training requirement in AHERA for all workers who may disturb asbestos in schools. This will help to address the problem of inadequate training of maintenance workers identified by the evaluation.
- planning an AHERA self-study guide for school officials assigned with AHERA responsibilities. It is expected in spring 1992.
- compiling, with the National Institute for Building Sciences, an operations and maintenance manual for school custodial and maintenance staff, which details the EPA's in-place management guidance in the Green Book. It is scheduled to be complete in early 1992.

AHERA Compliance and Enforcement Actions

The goal of our AHERA compliance and enforcement program has been to promote effective identification and management of asbestos-containing materials in schools. Our approach has been to ensure that inspections and management plans have been conducted, thereby establishing the basic elements of the comprehensive framework for controlling asbestos exposure as envisioned by AHERA. As noted above, approximately 97 percent of the nation's schools have conducted their AHERA inspections and submitted management plans to their states as required.

In implementing our compliance program, we have emphasized completion of these and other AHERA requirements over collection of large penalties from local education agencies. When a school fails to submit its management plan, the Agency has authority to issue a notice of noncompliance. Accordingly, approximately 7,400 notices were issued to schools which failed to comply with AHERA's inspection and management plan requirements on time. EPA also has authority under AHERA to issue civil penalties up to $5,000 each day for any violations. The Agency has issued 218 civil complaints against schools to date.

In addition, schools often rely upon outside individuals and firms, such as private asbestos consultants and contractors, to help them comply with AHERA. EPA has enforcement authority against these "other persons," under Title I of TSCA. EPA can issue fines up to $25,000 a day to other persons for certain violations, such as failure to properly sample materials, inspect buildings, develop proper management plans or use accredited personnel. EPA is now pursuing approximately 148 civil complaints involving such violations.

States have played a significant role in the AHERA compliance and enforcement program. EPA has enforcement cooperative agreements totalling $2.9 million with 22 states during FY 1991. Since the beginning of the AHERA program in FY 1989, state personnel have conducted more than 1,970 of the 3,776 AHERA compliance inspections.

Limited AHERA Rule Revision

We are also considering a limited AHERA rule revision, which should help us further clarify response action requirements and improve enforcement against other persons who fail to properly follow AHERA procedures.

We would, of course, supplement any rule change with continued interpretive guidance and technical assistance to improve understanding in the regulated community. A revised AHERA rule could increase the deterrent effect on other persons and schools by strengthening the regulatory foundation for a wider range of enforcement actions.

Model Accreditation Plan Modification

As mentioned above, EPA was directed to issue under AHERA a model accreditation plan for states to ensure training and accreditation for persons who inspect, manage and abate asbestos in schools. Since the proper training and accreditation of sufficient numbers of personnel is a cornerstone of the AHERA program, the competence of these accredited persons, and the quality of the work they perform in our schools, is an ongoing concern for EPA and the states.

Today, due in part to EPA seed funding and technical assistance, 33 states now have accreditation programs that meet or exceed the AHERA model plan for abatement supervisors and workers who conduct school projects -- and this number continues to rise. Another 15 states have some type of licensing or certification program for asbestos abatement which can be upgraded to the AHERA standard. Of these 48 states, 42 have extended their asbestos training and certification requirements to cover abatement work in public and commercial buildings, as well as schools. This is a dramatic improvement from 1985, when only four states had any kind of contractor certification program at all.

The past several years have seen a substantial increase in the number of competent asbestos professionals. We have estimated 100,000 or more AHERA-accredited persons are now available nationally for asbestos work. By July 1991, nearly 600 training providers were offering about 1,200 AHERA-approved training courses for inspectors, management planners, abatement contractors and workers.

EPA has also promoted national accreditation consistency, not only through the model plan, but by publishing model course curricula for accreditation training. In addition, EPA has provided seed money to the non-profit National Asbestos Council (NAC) to help develop the National Asbestos Examination and Registration System which establishes a 2-tier certification program for asbestos-control abatement professionals. The NAC program is now available for states to use if they choose to recognize qualifications which exceed the AHERA accreditation requirements and to promote reciprocity and flexibility among the states.

Finally, in accordance with the Asbestos School Hazard Abatement Reauthorization Act (ASHARA) of 1990, the Agency has begun a process to revise its model accreditation plan for states, which will increase hourly training requirements for abatement workers and extend coverage to those who inspect or conduct abatement in public and commercial buildings. In revising its model accreditation plan, the Agency is considering the recommendations made in the GAO report Asbestos: EPA's Asbestos Accreditation Program Needs Strengthening.

V. ASBESTOS IN PUBLIC AND COMMERCIAL BUILDINGS

In our AHERA report to Congress, and many times since, the Agency has pledged to assess the need for additional regulations for asbestos in public and commercial buildings. EPA, since that time, has embarked upon several activities, including the AHERA evaluation, to inform the decision on public and commercial buildings later this year.

Through the public dialogue process . . . EPA has sponsored a policy dialogue among groups which have a major interest in the asbestos policy regarding public and commercial buildings. These groups include building owners, realtors, mortgage bankers, insurers, building workers unions, public health interests, asbestos contractors and consultants, asbestos manufacturers, and representatives of federal, state and local organizations which have responsibility for the development and implementation of asbestos policies.

The policy dialogue ended last year. EPA is considering the issues and recommendations offered by the dialogue participants in its decision making on asbestos in public and commercial buildings.

Through the Health Effects Institute Research . . . Asbestos research initiated by the Massachusetts-based Health

Effects Institute (HEI) with EPA, Congressional and private sector support will include comprehensive monitoring studies to better characterize asbestos exposure in buildings. Of particular interest to EPA is HEI's initial literature review, which will summarize current scientific knowledge about airborne concentrations of asbestos in buildings, the extent to which such concentrations are amenable to control, and the health significance of various asbestos fibers. The review is due to EPA this month.

Through consultations with OSHA . . . EPA is actively coordinating its decision-making efforts on asbestos in public and commercial buildings with the Occupational Safety and Health Administration (OSHA), which is currently revising its standard for employee exposure to asbestos.

VI. CLOSING

In closing, the Agency is aware that the completion of asbestos inspections and management plans is only a part of the AHERA school management program. Parents, teachers, school workers, and school officials must all work together closely and cooperatively to ensure that their asbestos management plans are improved, effectively implemented and that the asbestos in our schools is properly maintained or abated. EPA will continue to assist schools in these efforts.

Thank you for the opportunity to speak to the Subcommittee, and I would be pleased to answer your questions.

Mr. **Synar**. Thank you very much, Ms. Fisher, for that summary of the program at this point. Now, before I get into some specific questions, let me kind of set the tone for today's hearing for the audience and for those who may not be as familiar with this program. First of all, would you define "friable" and "asbestos-containing material" for us?

Mr. **Kling**. Mr. Chairman, my name is Dave Kling and I will be happy to answer that question. Friable material is material that you can actually crumble under hand pressure, and it's a term of art that's used by asbestos contractors and asbestos professionals.

Mr. **Synar**. Now, for AHERA purposes, what is considered asbestos-containing material?

Mr. **Kling**. Any material that contains 1 percent of asbestos or more, sir.

Ms. **Fisher**. That's a statutory definition.

Mr. **Synar**. What did an AHERA inspection of school buildings involve, Mr. Kling?

Mr. **Kling**. Well, sir, it involved a series of activities. First of all, a school official had to make sure that they had an accredited person, someone who had been to a course that was approved either by the Agency or by the State, to conduct the inspection. Then they would go in and go through a series of activities that we outlined in some of our guidance.

Mr. **Synar**. There was a room-to-room visual inspection?

Mr. **Kling**. Yes, sir.

Mr. **Synar**. And if the inspector was uncertain about a particular material, then they would do a sample?

Mr. **Kling**. Yes, when we did the negotiated rulemaking for the proposed rule, sir, one of the things that the group that we had convened there decided is that sampling all suspect materials in a building might be very expensive for schools. So they came up with a scheme that EPA adopted whereby you could declare materials that might be suspect materials as "suspect," in which case you would treat them as asbestos-containing but you wouldn't have to go through the expense of sampling them at that time.

But maybe 2 or 3 years down the road, or maybe 15 years down the road, when you had to disturb that material by doing a major building renovation, then you could sample the material but you wouldn't have to do it in the crush of the AHERA activities.

Mr. **Synar**. The AHERA management plan was supposed to contain drawings of the buildings inspected, locations where samples were taken, laboratory results of samples, types and cost of remedial actions, and names of responsible persons; is that correct?

Mr. **Kling**. Yes, sir, there were a series of those requirements.

Mr. **Synar**. Now, as I understand it, if an AHERA inspection discovered asbestos in the school, school personnel would not necessarily have to remove that asbestos-containing material which is probably the most expensive way in dealing with the problem. As an alternative to removing that, Mr. Kling, and depending on the physical condition of that asbestos-containing material, the school personnel could enclose or encapsulate the asbestos-containing material or develop an operations or maintenance plan to deal with the material.

Would you describe the four acceptable methods for dealing with asbestos-containing materials? And I'm particularly interested in the development of that operations maintenance plan, encapsulation, enclosure, and removal.

Mr. **Kling**. OK, very briefly, let me start with removal. Removal of asbestos is, as you pointed out, probably the most expensive type of abatement activity. It's also an activity that's of concern to the Agency if it's done improperly, because removal by its very nature disturbs the material and can actually put fibers into the air when they wouldn't be in the air if there were a good operations and maintenance program. So the Agency does not recommend removal of asbestos across the board; it's not been the Agency's policy.

You mentioned enclosure of the material. This would be putting asbestos behind a barrier so that it could not be disturbed, like walling it in or enclosing the material behind some kind of a barrier.

You mentioned encapsulation. This would be putting some kind of a sealant that would keep the fibers intact on the material or over the material. And that was done sometimes with asbestos that you find in cements in the material that you might find on a ceiling.

And finally, you talked about operations and maintenance, and there's also a repair aspect to that. And the repair aspect would be doing anything other than encapsulation or enclosure that you might do to asbestos. For example, you could put some kind of a container around a pipe wrap that might have some minor damage or that you wanted to protect from damage.

But as far as an operations and maintenance procedure is concerned, that would be looking at the material on a regular basis, making sure that building custodial personnel do not disturb that material without understanding it's asbestos-containing nature and having the proper work protections afforded to them and sealing off the area as necessary. And also the building occupants, not the maintenance personnel but the people that just work in the building, do not go around disturbing that kind of material.

Mr. **Synar**. Ms. Fisher, let me ask you a very simple question: How many school buildings are there in the United States?

Ms. **Fisher**. There's about 40,000 local education agencies.

Mr. **Kling**. Yes, I would say there's roughly about 100,000-plus school buildings.

Mr. **Synar**. How many does EPA estimate that have asbestos-containing materials?

Mr. **Kling**. We've estimated in the larger context of buildings around the country, I think——

Mr. **Synar**. No, I'm not asking that, I'm asking how many do you estimate in the school buildings where our children go to school are there asbestos-containing materials?

Ms. **Fisher**. We think most of them do have asbestos of some sort.

Mr. **Kling**. The nonfriable type, yes.

Mr. **Synar**. 100,000 schools?

Ms. **Fisher**. Yes, but based on what we know, we think most of the schools have some asbestos-containing material, except those that were constructed I guess in the late 1980's would not have asbestos because the products that asbestos is in were banned.

Mr. Synar. So the bottom line is that there are very few children that are going to school today in the United States that may not have potential exposure to asbestos?

Ms. Fisher. That's probably true.

Mr. Synar. As I understand, the AHERA regulations were developed as a result of a negotiated rulemaking process: is that correct?

Ms. Fisher. That's correct.

Mr. Synar. Why did EPA choose to use a negotiated rulemaking for the AHERA regulations rather than the traditional rulemaking process?

Ms. Fisher. We chose the negotiated rulemaking process because of speed. The Congress gave us 1 year to promulgate final regulations; that is a very short period of time. Asbestos is a rather controversial area. We were concerned about getting the rule out in time. We were concerned about not being sued in terms of the contents of the rule and thought that a negotiated process would be the most expeditious way to get a good rule in the timeframe that we were given.

Mr. Synar. How many people were on that negotiating committee?

Mr. Kling. There were about 30, as I recall.

Mr. Synar. And they represented educational organizations, labor unions, asbestos product manufacturers, environmental community, asbestos abatement contractors, professional associations of architects, consulting engineers, industrial hygienists, States, and EPA; correct?

Ms. Fisher. That's correct.

Mr. Synar. When did EPA propose the AHERA rules published in the Federal Register?

Ms. Fisher. Pardon me?

Mr. Synar. When did they propose the rules that were published in the Federal Register?

Ms. Fisher. We proposed them in April 1987.

Mr. Synar. And when was the final AHERA regulation published?

Ms. Fisher. In October 1987.

Mr. Synar. Do you believe that that negotiated rule process resulted in a clear AHERA regulation and would have been achieved through the normal rulemaking process?

Ms. Fisher. I think that if we had done a normal rulemaking process the rule might have been clearer, it's hard to say for sure. We probably would have had a longer period of time, in other words I don't think we could have met the timeframe but we might have understood some of the shortcomings a little bit better.

Mr. Synar. And the final AHERA regulations became effective in December 1987, correct?

Ms. Fisher. That's correct.

Mr. Synar. Now, AHERA initially called for all school management plans to be submitted to the State agencies by October 12, 1988; is that correct?

Ms. Fisher. That's correct.

Mr. **Synar**. And that would have allowed about 10 months for local education agencies to have completed this work; but in July 1988, Congress passed an amendment to AHERA which extended that completion deadline. Under that amendment, LEA's were to submit their management plans to State agencies by May 9, 1989; is that correct?

Ms. **Fisher**. That's correct.

Mr. **Synar**. Ms. Fisher, do you know how much it costs a typical local education agency to perform this initial AHERA work and what's the total compliance cost for all the LEA's in this first round?

Ms. **Fisher**. Thus far, we think the total cost of implementation of AHERA at this point is $3 billion.

Mr. **Kling**. Yes, it's about $3 billion.

Mr. **Synar**. $3 billion?

Mr. **Kling**. Yes.

Ms. **Fisher**. Yes, that includes the inspections, the management plans, and the removals that have been undertaken thus far, so it's the whole package.

In terms of a price per LEA, it varies tremendously because of the number of schools and the size of the schools and the complexity of the plans and that sort of thing. So there's a very wide range as to what it might cost a school district.

Mr. **Synar**. What's the range? Give us the range there.

Mr. **Kling**. Well, just as an average, sir, I think we estimated in our final rule about $1,400—and correct me if I'm wrong—$1,400 for the inspection part and about $3,000 to $4,000 for the management planning part.

Mr. **Synar**. So that's a total of $6,000 per unit?

Mr. **Kling**. Yes, on the average sir, but as Linda mentioned, large school districts where large buildings might find their costs much higher than smaller schools——

Mr. **Synar**. By the end of 1987, December 1987, what materials had you provided to the LEA's to help them implement this AHERA regulation?

Mr. **Kling**. Yes, sir, we provided, I think, a very wide variety of materials to schools. We started by sending them the AHERA schools rule, itself, so that they actually had a copy of the regulation; that happened right after the rule was promulgated in October. We also sent them a list of EPA-approved university and private training programs in case school officials, which was allowed under the rule, wanted to get their own personnel accredited to do the inspections and management plans in their schools. Also, during this period we started working with States to grant approval of State programs for accrediting these contractors that went into school buildings.

But as far as what we sent to the schools, we had about eight direct mailings to schools during this period. It included a number of documents—and I brought some of them with me—I mentioned the schools rule. In December, we also sent them a sheet that talked about immediately enforceable activities that we were going to be pursuing under AHERA.

We sent them a little guide which includes checklists on how to comply. We sent this to schools in February 1988.

We followed that with, in May 1988, a document that provided some guidance on the regulation in more detail, and that we called the "100 Questions" document.

Mr. **Synar**. Let me ask you about that, if I could interrupt you. Do any of those questions discussed in that questionnaire ask whether wallboard is considered suspect material under AHERA?

Mr. **Kling**. Yes, sir, there's a question that does address that explicitly.

Mr. **Synar**. Where is that?

Mr. **Kling**. Question 35, it provides a listing of a number of materials that inspectors might find in buildings. And then it calls them either suspect asbestos or not covered by the AHERA rule. Wallboard is listed there, and it is checked as a suspect material.

Mr. **Synar**. What about the other question, No. 85?

Mr. **Kling**. Yes, sir.

Mr. **Synar**. OK, now is that Agency guidance document the same as an Agency regulation?

Ms. **Fisher**. It's not an Agency regulation. It was issued as an attempt to add clarity and interpret the actual Agency regulation.

Mr. **Synar**. Mr. Cox.

Mr. **Cox**. Thank you, Mr. Chairman. Just to follow up on the wallboard discussion; in late 1988 did some State agencies start refusing to accept certain LEA management plans for a variety of reasons?

Ms. **Fisher**. The management plans were to be submitted to the States under the law. And the States were given the option of reviewing those plans for completeness and either approving them or disapproving them. Again, it was not a mandatory inspection by the States.

As States reviewed them, many of them did reject the plans, and many of the States that did reject them then turned around and worked with school districts to get the improvements to the plans where necessary.

Mr. **Cox**. Was the failure of some management plans to address wallboard as an asbestos-containing material one of the reasons that those States would not accept certain of those plans?

Ms. **Fisher**. The contents of the plans was definitely one of the reasons States rejected plans. And I think wallboard was one of the grounds for rejection.

Mr. **Cox**. Are there several building materials that fall within the common term "wallboard," and if so, what are those different materials?

Mr. **Kling**. Yes, I may defer to Mr. Brandner on this, but it would include things like gypsum board could be described as wallboard, millboard, transite, a series of terms.

Mr. **Cox**. Sheetrock, dry wall, plasterboard, things like that?

Mr. **Kling**. Yes, sir.

Mr. **Cox**. What State or States raised the wallboard issue?

Mr. **Stahl**. Sir, I'm Mike Stahl. I think one of the places where the wallboard issue was raised was in the State of Michigan. I believe there were others that raised that issue, as well as other issues surrounding the management plans that caused them to reject them.

Mr. Cox. When was EPA first asked for a formal statement on the asbestos and wallboard issue in terms of whether wallboards were covered under AHERA and should be addressed in inspection and management plans?

Ms. **Fisher**. EPA thinks we laid out the fact that wallboard should be part of the inspection. We were specifically asked by the Gypsum Association and by Hall-Kimbrell, I believe, in the winter of 1989.

Mr. **Kling**. Yes, although we were asked explicitly by contractors when we were preparing the 100 Questions, and it came up at that point. So I would say before May 1988.

Mr. Cox. Before May 1988?

Mr. **Kling**. Yes, sir. May 1988 is when we published the 100 Questions document. We got together——

Mr. Cox. Right, and you talked about that earlier with the chairman's questions. But my question—what I'm trying to understand more specifically—is in an attachment to Mr. Kimbrell's testimony for today, he states that he wrote a letter to EPA, dated January 30, 1989, in which he stated that his company's assessments have not included sheetrock and hardwall plasters. He says that he asked in his letter that EPA review the issue and publish a formal statement on whether or not that is required to be included in the inspections and in the report.

Mr. Kimbrell is going to testify that EPA never responded to that letter. My question is: Did EPA respond to that letter?

Ms. **Fisher**. First of all, one of the problems we've had with Hall-Kimbrell is I don't think they've accepted delivery of the message. The fact that wallboard was covered was made clear in EPA written guidance, the 100 Questions, in May 1988, which was before they sent us letters. So I think the issue with them is they didn't want to hear the answer to their question.

They did write us in 1989 a few times——

Mr. **Synar**. But that guidance is not regulation is it, Ms. Fisher?

Ms. **Fisher**. No, it's not, but it is official Agency position. It does lay out exactly what we believe needed to be covered.

Mr. Cox. But they did write a letter asking specifically an answer to that question?

Ms. **Fisher**. That's correct.

Mr. **Synar**. Did they receive a response to that letter?

Ms. **Fisher**. They did receive several responses by phone. Additionally, we set up some meetings with them. In fact, at one point they informed us that they'd rather we not write to them and set up a meeting instead, which we did do. They were given a copy of the letter that we sent to the Gypsum Association which laid out clearly our position.

Mr. Cox. All right, but it's your testimony that Hall-Kimbrell asked you not to answer their letter of January 30, 1989, in writing; is that right?

Ms. **Fisher**. Was it the January or another one?

Mr. **Kling**. I'm not sure it was the January letter, sir, it may have been a subsequent letter.

Ms. **Fisher**. They sent us a few.

Mr. Cox. All right, but my question is—as I understand it, you did not respond to the January 30, 1989, letter of Hall-Kimbrell?

Ms. **Fisher**. That's correct.

Mr. **Cox**. Is it your testimony that Hall-Kimbrell asked you not to provide a written response to that letter?

Ms. **Fisher**. I don't know if it was that letter or one of the subsequent ones.

Mr. **Cox**. All right. So can you tell me why it is that EPA didn't respond in writing to Hall-Kimbrell's letter of January 30, 1989?

Ms. **Fisher**. I think in hindsight we wish we had written a letter to them. We did have several conversations with them about the issue.

Mr. **Cox**. But do you know why you didn't—you or someone at EPA—give a written response to them?

Ms. **Fisher**. I don't think we have a reason. I think we just didn't do it.

Mr. **Cox**. OK. Now, on May 30, 1989, Mr. Schechter of EPA's Office of Pesticides and Toxic Substances responded to the Gypsum Association's January letter; this would have been a few months after the Hall-Kimbrell letter.

The gist of Mr. Schechter's response to the Gypsum Association was: Although most wallboard may not contain asbestos, EPA determined in the negotiated rulemaking leading up to the AHERA regulation that some types of wallboard do contain asbestos, especially fire-rated wallboard. It was decided not to rely on building or manufacturer's records concerning the asbestos content of wallboard. Therefore, EPA stated in its letter to the association that wallboard is considered suspect asbestos-containing material under AHERA regulations. Is that a fair characterization of your response to the association?

Ms. **Fisher**. Yes, sir.

Mr. **Cox**. Did EPA provide a similar written response or a copy of that response to Mr. Kimbrell who had inquired about the same issue?

Ms. **Fisher**. We did provide a copy of that response.

Mr. **Cox**. To Mr. Kimbrell?

Ms. **Fisher**. Yes.

Mr. **Cox**. Do you know when that was done?

Ms. **Fisher**. It was done as part of one of the meetings that we had with that company, I believe, in the spring of 1989. And that letter, I might add——

Mr. **Cox**. Are you saying that you met with Hall-Kimbrell in the spring of 1989?

Mr. **Kling**. Actually, it was more in October, I'm sorry.

Mr. **Cox**. So Mr. Kimbrell wrote a letter in January 1989. There was no answer to his letter, but there was a discussion of the issue raised in that letter in the fall of 1989 after you gave a specific written response to the Gypsum Association in May 1989.

Ms. **Fisher**. That's correct, we did have conversations with their company over the phone. The letter that we sent to the Gypsum Association carries no more weight than the 100 Questions that Hall-Kimbrell had in their hands in May 1988. So the fact that they did not get the letter to the Gypsum Association in a timely way did not impart any new knowledge on them that the 100 Questions hadn't.

Mr. **Cox**. But——

Mr. SYNAR. Hold it, Ms. Fisher, you just said—excuse me——

Mr. COX. I'm sorry, Mr. Chairman, go ahead.

Mr. SYNAR. Five minutes ago you said you sent them the letter. Now you're saying you didn't send them the letter. Did you sent them the letter or not?

Ms. FISHER. No, I did not say we sent them a letter.

Mr. SYNAR. Well, I'm sitting up here hearing you say, 5 minutes ago, you sent the Gypsum letter to Hall-Kimbrell.

Mr. KLING. No, I believe she said that we gave it to them, sir.

Ms. FISHER. In the meeting—we gave them the contents of that in the meeting.

Mr. SYNAR. In October?

Ms. FISHER. That's correct.

Mr. SYNAR. Mr. Cox.

Mr. COX. All right, just to follow up on that there's another attachment in Mr. Kimbrell's testimony that was on August 18, 1989, between the May letter to the Gypsum Association and the fall meeting with Hall-Kimbrell, in which he wrote to the EPA saying that he had not received a response to his January letter and he asked for a meeting with EPA in Washington to discuss the issue.

Mr. Kimbrell is going to testify that EPA did not respond to this letter either. Did EPA respond to the letter, and if so, how was that response transmitted?

Mr. KLING. Yes, I believe we talked to him on the phone about the issue and this was where we decided to sit down with them and have a meeting instead.

Mr. COX. Just so that our record is clear, you said, "I believe we responded by phone." Do you know who it was who made the phone call and to whom they spoke?

Mr. KLING. No, sir, I would have to check that for you.

Mr. COX. Could you do that and provide that to the committee?

Mr. SYNAR. But no letter was provided?

Ms. FISHER. No.

Mr. KLING. No, sir, no letter was provided that I know of.

Mr. COX. On August 29, 1989, Ms. Gina Bushong of EPA's Office of Pesticides and Toxic Substances wrote another letter to the Gypsum Association concerning asbestos in the wallboard. What was the gist of that letter, if you know?

Mr. KLING. Yes, as far as that letter was concerned, we provided a number of attached materials that supported the Agency's claim that asbestos could be found in wallboard, these kinds of material, wallboard-like materials.

Mr. COX. Now you have two letters from Mr. Kimbrell requesting information about wallboard vis-a-vis asbestos. Did you provide Mr. Kimbrell with a copy of the August letter to the Gypsum Association, if you know?

Mr. KLING. Yes, sir, he had a copy——

Mr. COX. When did you do that?

Mr. KLING. I'm not exactly sure.

Mr. COX. How do you know that someone sent him a copy of that letter?

Mr. KLING. Because I believe Mr. Kimbrell sent it back to us.

Ms. FISHER. He sent back the attachments that we had given him in one of his followup letters.

Mr. Cox. Well, Mr. Kimbrell will testify, and we can ask him those questions.

On October 3, 1989, was when you finally met with Hall-Kimbrell; is that right? Now, Mr. Kimbrell is going to testify that EPA officials at the meeting acknowledged that the regulations were ambiguous and ask Hall-Kimbrell to provide information on the issue of whether wallboard should be considered an asbestos-containing material. Do you agree with his interpretation of that meeting?

Mr. **Kling**. No, sir, I believe we—I won't say "we believe," I was not there—but in my discussions with staff that were there, they made clear to Mr. Kimbrell the fact that wallboard is asbestos-containing material, or suspect asbestos-containing material, pardon me.

Mr. Cox. Not long after that meeting, a Michigan State official talked with Steve Young of EPA who was in attendance. And from the State official's notes of that conversation, which have been made available to the committee, it certainly looks like Mr. Young had the same interpretation of the meeting. But, in followup to the October 3 meeting with EPA, Mr. Richard San Filipo of Hall-Kimbrell wrote EPA on October 25, 1989. Can you state the gist of that letter?

Mr. **Kling**. Yes, in that they were seeking a decision as to whether or not their position on wallboard would—if the Agency would be acceptable to their position on wallboard.

Mr. Cox. And what was the EPA response to that letter?

Mr. **Kling**. Well, we did not—I think at that time we asked them for, I believe, additional information.

Mr. Cox. How was that transmitted to Mr. Kimbrell?

Mr. **Kling**. We did not get the additional information that Mr. Kimbrell——

Mr. Cox. I understand, but how did he know he was supposed to give you additional information?

Ms. **Fisher**. I think at that meeting the company offered to provide us some additional information. We told them we would like to receive it. I don't believe it ever came.

Mr. Cox. What meeting are you referring to?

Ms. **Fisher**. The one in response to that letter, or following that letter.

Mr. Cox. But this was a letter that was a followup to the meeting, if the information the subcommittee has is correct. This has nothing to do with the meeting other than a followup request from Mr. Kimbrell.

Mr. **Kling**. No written response from—after we asked for this additional material, we got no written response from Hall-Kimbrell until June.

Mr. Cox. I don't want to get this confused, so let me try again. There is a meeting on October 3. Mr. Kimbrell writes a letter. You've described the gist of that letter. My question is, did you respond to that?

You said you requested additional information. I have yet to hear a response to my question, how was that transmitted to Mr. Kimbrell, that you wanted additional information in order to respond to his letter?

Mr. KLING. I'm sorry, sir. There was a telephone conversation on December 13 between Mr. San Filipo of Hall-Kimbrell and Steve Young of EPA. At that time, Mr. Young told Hall-Kimbrell that EPA staff wanted additional information regarding how Hall-Kimbrell personnel have been able to distinguish gypsum wallboard from other wall materials. That is the material. That is the information.

Mr. SYNAR. Would the gentleman yield?

Mr. COX. I certainly will, Mr. Chairman.

Mr. SYNAR. Ms. Fisher, what it appears to this subcommittee in the series of questions Mr. Cox has just asked is that Mr. Kimbrell kept asking before the inspections were done, and you didn't respond until after the inspections were done. Can you show us anything in the chronological history that we've just gone through that would make this subcommittee believe anything otherwise?

Ms. FISHER. I guess I would like to distinguish two issues because I think they're important. The first is whether or not wallboard was asbestos-containing material that should have been included in the inspections. The second one was whether or not that was appropriate.

Our feeling is Hall-Kimbrell knew full well that wallboard was suspect-containing material. Their own training documents laid out the fact that wallboard does, on occasion, contain asbestos. The second set of issues, the ones I think you were going to get to is that inappropriate part.

In other words, do we have a lot of documentation that shows wallboard sometimes, if ever, falls within the 1 percent definition in the law. I think that's the second issue that they were going back and forth on.

Mr. SYNAR. No, Ms. Fisher, that's not what I'm going after at all. We've just gone through a series of questions that show there's nothing in the regulations on wallboard. There are a lot of guidances which do not have the same powers of regulation.

It appears through the chronological following of these letters that Kimbrell kept asking whether or not this was indeed the case, and you have yet to satisfy this chairman or this subcommittee that you provided any letters in response that would answer that question that Mr. Kimbrell asked before the inspections were completed.

It appears now that the answer was finally given to Mr. Kimbrell after those inspections had indeed been completed. Do you have any evidence to the contrary?

Ms. FISHER. No.

Mr. KLING. We have no written letter.

Mr. SYNAR. Thank you.

Ms. FISHER. The one thing I would like to add, however, is the fact that, first of all, the 100 Questions did come out in May and there were inspections.

Mr. SYNAR. Again, Ms. Fisher, I'm going to pin you down on this. Guidances are not regulations.

Ms. FISHER. I understand that. But the regulations were never intended to lay out item by item what the inspections were supposed to contain.

Mr. **Synar**. Fine. Let's say I grant you that. Then don't you think if a specific question is asked, then a response would be necessary in order to give guidance, further guidance if specific questions are asked?

Ms. **Fisher**. Clearly, in hindsight, we wish we had written him a letter. However, he did have copies of the 100 Questions. Secondly, in his own training materials he included the fact that wallboard on occasion contains asbestos. So it's hard to say he is an innocent person who did not understand.

Mr. **Cox**. Well, didn't the Gypsum Association also have access to all that information?

Ms. **Fisher**. Yes.

Mr. **Kling**. Yes.

Mr. **Cox**. Why did you see fit to send a written response to the Gypsum Association and not to Mr. Kimbrell?

Ms. **Fisher**. We should have.

Mr. **Kling**. One other point, Mr. Cox, we did mention wallboard by name in the appendix of the 1987 schools rule as a material that could contain asbestos.

Mr. **Cox**. The thing that's confusing to me is that I'm sure all that information was equally available to Gypsum. You're saying Mr. Kimbrell should have known. You saw fit to give a direct response to the Gypsum Association and not to Mr. Kimbrell. That's the information before us. I'm just trying to find out why it is you say you should have. I think you answered it.

Ms. **Fisher**. That's clear. We absolutely should have. But we get a lot of companies that write us letters with questions that they know the answer to. The fact that they continued to write us may have equally been the fact that they didn't like the answer.

Mr. **Cox**. Well, wasn't Mr. Kimbrell's, at that time at least, the largest company providing the service in the United States? Isn't that correct?

Ms. **Fisher**. We know that now. I'm not sure at the time we would have known that.

Mr. **Kling**. Mr. Cox, one differentiation between the Gypsum situation and the contractor situation, we were in the heat of trying to implement the AHERA schools rule at that time. We got many calls like this at the Agency, both at headquarters and our regional offices.

Many times we would call these people back and give them the information rather than writing it back. We did that with the contractors because we knew they were under the gun. For somebody like Gypsum, which is an association that wasn't out there doing the work, we did have a tendency to respond to them, I think, more through writing.

We did a lot of technical assistance over the phone. I'm sure we talked to members of Hall-Kimbrell's staff during this period on a wide variety of issues. But because we got a lot of calls at headquarters and we got a lot of calls at the regional offices, we did not keep records of those calls.

Again, when we got letters from contractors, many times we made phone calls back as quickly as possible to give them the information they needed rather than committing that to writing.

Mr. **Cox**. Thank you, Mr. Chairman.

Mr. **Synar**. Mr. Luken.

Mr. **Luken**. Thank you, Mr. Chairman. In response to a question from the chairman, you indicated that there are 100,000 school buildings in the United States, approximately.

Ms. **Fisher**. That's correct.

Mr. **Luken**. One of the issues that's raised is who conducts the inspections to determine whether the LEA's are in compliance with AHERA. Who does that?

Ms. **Fisher**. We have Federal inspectors and State inspectors as well. About 22 States have cooperative agreements with EPA where we give them money and they do their own State inspections.

Mr. **Luken**. What is the purpose of those compliance inspections? Are you seeking to determine compliance with AHERA, basically?

Ms. **Fisher**. Yes, sir.

Mr. **Luken**. Looking for a management plan?

Ms. **Fisher**. Looking at the quality of the inspection and the quality of the management plan.

Mr. **Luken**. Of the 100,000 school buildings, roughly, how many have had compliance inspections?

Ms. **Fisher**. I believe that the combination of State and Federal inspections is a little over 3,000.

Mr. **Stahl**. It's about 3,700.

Mr. **Luken**. How are those selected?

Ms. **Fisher**. We have a neutral inspection scheme where we don't try to target any particular subset of schools or anything, but we have a neutral inspection scheme.

Mr. **Luken**. Can you describe that scheme to me? I understand there are three or four components to it, the way you select——

Mr. **Stahl**. Sure. We will, first of all, rely on certain kinds of tips and complaints that might be sent into to EPA or phoned into EPA about——

Mr. **Luken**. Tips from anyone?

Mr. **Stahl**. It could be a school employee. It could be a parent from a school. It could be any number of sources. That's one way that we might target an inspection. We also put together a scheme that tries to, in effect, scan the population of schools and get sort of a representative sample of those schools inspected. So we look at some large schools, some small schools, some public, some private. We also attempted to target in the initial days some of the LEA's where there was a response action in progress. There's a whole compliance monitoring strategy that attempts to lay out the scheme we use to target.

Mr. **Luken**. Would the results of the sampling, the 3,000 schools that have been inspected, in any way be statistically valid for purposes of projecting the results across LEA's nationwide?

Mr. **Stahl**. No. It's not a statistically valid sample. In that sense of the word, sample is perhaps a misnomer.

Mr. **Luken**. Why is that? Because you've selected sites where you have a suspicion to begin with?

Mr. **Stahl**. That's part of what goes into the compliance monitoring strategy, is we do try to target certain kinds of issues that we think we're going to find in schools, in addition to broadly scanning the population of schools so that we get a cross section of them.

Mr. **Luken**. For the fiscal year 1991, how many States have cooperative agreements with the EPA under which they perform asbestos compliance inspection of LEA's?

Mr. **Stahl**. It's 22 States, sir.

Mr. **Luken**. You indicate you have cooperative agreements with these 22 States. But information EPA submitted to us shows only 13. Why is that?

Mr. **Stahl**. I don't know what the contradiction could be. The records we have say 22 States. Now it could be that some States are only doing certain kinds of activities. There's a very mixed bag of activities that a State could do under a given cooperative agreement.

Mr. **Luken**. As of September 1991, how many enforcement complaints has EPA issued for alleged violations of AHERA?

Mr. **Stahl**. Roughly 360. That would include both local education agencies and so-called other persons, which would be contractors and other types.

Mr. **Luken**. You have about 180 that are pending?

Mr. **Stahl**. That's right.

Mr. **Luken**. Of those 180, 148 are being pursued against other persons, meaning non-LEA's; is that right?

Mr. **Stahl**. That's correct.

Mr. **Luken**. As I understand it, of the 366 complaints issued, 37 were still not entered into your data base, which leaves 329 complaints. How many alleged violations of AHERA regulations were involved in the 329 complaints?

Mr. **Stahl**. I believe I do——

Mr. **Luken**. What is the most frequent violation?

Mr. **Stahl**. There are about 400 violations that are included within those civil actions that we've mentioned, the 366. About half of them are for violations where LEA's have failed to submit or include certain kinds of information in their management plans. So, fully half of the violations contained in the civil actions at this point have to do with the submission of the plan and what's in it.

Mr. **Luken**. Is it a fair statement to suggest that most of these violations are smaller schools where they've kind of been picked off for not developing a complete master plan?

Mr. **Stahl**. I don't know that I would say that the civil actions involve a disproportionate share of small schools. I think it is probably fair to say that smaller schools tend to be the ones who didn't find out as much about AHERA and tended, perhaps, not to act as quickly as some of the bigger school districts.

Mr. **Luken**. Can you name a large school district where you found a violation, offhand?

Mr. **Stahl**. Not off the top of my head. I can go through a list or provide it for the record.

[The information follows:]

Large School Districts Cited under AHERA - Examples

0 **East Chicago City School District**
East Chicago, Illinois
Violations include - failure to inspect
Penalty assessment - $50,000

0 **Archdiocese of Los Angeles**
Los Angeles, California
Violations include - failure to inspect, notify parents, teachers of management plan availability.
Penalty assessment - $30,000

0 **Catholic Archdiocese of San Francisco**
San Francisco, California
Violations include - failure to maintain records, inspect, notify parents, teachers of management plan availablity.
Penalty assessment - $19,300

0 **Sidney Public Schools**
Sidney, Nebraska
Violations include - submitting false information to state
Penalty assessment - $25,000

0 **Seminole County School District**
Sanford, Florida
Violations include - failure to inspect, maintain records
Penalty assessment - $47,700

Mr. **Luken**. I appreciate your doing that. What are the total final assessments that have been made for the 329 violations?

Mr. **Stahl**. That is about $149,000. Again, that is not all against LEA's. That would include other persons. I think the point to emphasize here is what the statute tells us what we are supposed to do with respect to penalty dollars assessed against LEA's, which is to direct that money toward compliance work, like developing the management plan. Any excess penalties then go into the asbestos trust fund.

Mr. **Luken**. As you testified, you're more interested in compliance and civil penalties; is that a fair statement?

Mr. **Stahl**. I think we have run our program in a way that minimizes the amount of penalty dollars that we assess and tries to get management plans corrected. That includes actions we've taken against other persons, not just against LEA's.

Ms. **Fisher**. In fact, Congressman, even in the statute itself where the Agency is allowed to assess penalties against the school district, the statute sets forth that the penalty amount should be put back into the school to help come into compliance, as opposed to just come in to the Federal Government, as you might have under another type of environmental penalty.

Mr. **Luken**. By far, your biggest case, though, is the one against Hall-Kimbrell where you've got 20 violations and $6 million penalty or something like that.

Ms. **Fisher**. That's correct.

Mr. **Stahl**. It's the largest.

Mr. **Luken**. Of the 148 civil complaints EPA currently is pursuing against other persons, including Hall-Kimbrell, is there any commonality of alleged violations? In other words, do a good percentage of them center on the same kind of violation?

Mr. **Stahl**. I think it's fair to say that a number of them deal with missed materials of a variety of kinds, not just wallboard. I think a number of them also deal with what's in the management plan, the completeness of the management plan.

Mr. **Luken**. So the nature of the complaint that you have with Hall-Kimbrell is the same, just the scope of it is smaller in these other cases?

Mr. **Stahl**. I think there are common themes between the Hall-Kimbrell case and other cases we're pursuing, that's true.

Mr. **Luken**. Thank you, Mr. Chairman.

Ms. **Fisher**. If I could come back to one point you raised earlier, and that's the question of are we picking on some of the smaller schools, where you might see that is prior to issuing a civil complaint, the Agency will issue notice of noncompliance to the schools.

As of, I believe it was, December 1989, we had about 94 percent of the schools that had done an inspection and submitted a plan. We basically issued a notice of noncompliance to the remaining schools, schools that had not even done a plan at all. Those did tend to be smaller schools that were having a harder time adjusting.

With a lot of work between EPA and the States and those schools, many of them came into compliance the following year. So a civil complaint was never actually filed against those. But I think after those notices of noncompliance there was concern that we targeted at smaller schools. It wasn't so much they were targeted; that tended to be where people didn't comply in the first round.

Mr. **Luken**. My only point, Mr. Chairman, and then I'll conclude is that the smaller schools might have a difficulty complying.

Ms. **Fisher**. That's correct.

Mr. **Luken**. It would be my hope that EPA and the States would work with these smaller schools so they don't assess penalties against them when their violation, really, basically, is not knowing how to comply, not having the wherewithal or the ability to comply. Thank you very much.

Mr. **Synar**. Thank you, Mr. Luken. Now, Ms. Fisher, the main responsibility of the States under AHERA is to receive the management plans and to certify asbestos professionals; is that correct?

Ms. **Fisher**. That's correct.

Mr. **Synar**. Now, AHERA does not require the States to actually review these management plans. For example, AHERA requires the LEA's to submit the management plans to the States. But once they've received the plan, the State had 90 days to "disapprove" the plan. Is that correct?

Ms. **Fisher**. That's correct.

Mr. **Synar**. Now, if a State did not disapprove a management plan within 90 days, was the plan considered approved?

Ms. **Fisher**. It wasn't considered approved or disapproved. I think it just——

Mr. **Synar**. It was considered accepted; was it not?

Ms. **Fisher**. That's correct.

Mr. **Synar**. What type of guidance did EPA provide the States as to how they should review management plans?

Ms. **Fisher**. The Agency worked with States to set up workshops to educate them as to what were the type of things they should be looking for in the management plans. Additionally, we prepared a checklist that States could follow. As they reviewed the management plans, it would kind of set out a framework for them to do the review and do an evaluation.

Mr. **Synar**. Did the States periodic report to EPA on the status of the LEA comply with these management plan requirements?

Ms. **Fisher**. Yes, they did. I believe, in fact, according to the statute, they at least had to respond to us by December 1989 how many had, in fact, submitted plans.

Mr. **Synar**. Did all the States review management plans?

Ms. **Fisher**. I don't believe all of them did. I think many of them did and many of them did use the EPA checklist.

Mr. **Synar**. We have, at least, New Mexico and the Virgin Islands that did not. What about Connecticut and Rhode Island? One of your reports said that these two States had waivers. What does that mean?

Mr. **Kling**. Yes, sir. Under the provisions of the law, a State that had a program, a regulatory program like AHERA that was comparable to AHERA, could come to the Agency and apply for a waiver, so that their own State regulations could apply in their jurisdictions as opposed to the AHERA program.

Mr. **Synar**. Did these States who reviewed these management plans do so in a uniform manner, or did each State have different review processes?

Mr. **Kling**. They were different, sir. We did create a checklist that Ms. Fisher mentioned that helped unify that process.

Mr. **Synar**. There was no uniformity necessary?

Ms. **Fisher**. They didn't have to use the checklist. They could do their own program.

Mr. **Kling**. They did not have to use the checklist.

Mr. **Synar**. Now, in your summary of the stated AHERA activity dated as current as September 25, 1989, you said that six States had conducted reviews of management plans which were considered very stringent. Those States were Massachusetts, Maine, Vermont, Oklahoma, Nebraska, and Idaho. Is that correct?

Mr. **Kling**. Yes, sir. I don't have that document in front of me, but yes.

Mr. **Synar**. That summary described the AHERA activities by EPA region and by the State, the type of management review by the State, the State's rejection rate, the type of management plan involvement program. What did the documents show for the most populous States of California and New York? Does somebody have that document?

Ms. **Fisher**. I'm not sure we have—well, I'm sure with all of our binders, we have it somewhere.

Mr. **Synar**. Our review of it shows that for California it showed some level of review "not applicable" for the rejection rate and none for a plan on the improvement program. For New York, it showed almost none for the review, a 4 percent rejection rate and visits to LEA's to help with management plans and abatement. Does anyone disagree with that?

Ms. **Fisher**. I don't think so.

Mr. **Stahl**. I think our view is that New York actually did a pretty thorough job of reviewing plans. California, I think their performance was a little spotty.

Mr. **Synar**. When our subcommittee staff visited EPA-San Francisco headquarters, EPA's regional staff told our staff that while your reports showed that California had 4,000 LEA's, the State, in fact, has 12,000 management plans. For example, the city of Los Angeles is one LEA that had had 755 management plans.

Your regional people also told us that the California personnel expanded on EPA's checklist and looked at about 100 items when reviewing the management plans. However, the office was abolished June 30, 1989, even though the bulk of the plan still had to be reviewed.

Now, after that, the personnel detailed to complete the management plans only looked at two items. They were the signature of the LEA representative and the abatement cost. Now, in at least these two States, New York and California, it doesn't look like most of the LEA management plans even got a legitimate review by State agencies. Is that correct?

Mr. **Kling**. Yes, sir.

Mr. **Synar**. How do you know if those plans are good if they didn't even get a proper review, Mr. Kling?

Mr. **Kling**. Well, sir, under the law, States had the option of reviewing the plans or not. Some States took the exercise more seriously than others, I suppose. They had more resources to bring to bear.

Mr. **Synar**. Well, how do we know if they're good, Mr. Kling? I mean, how can I assure the children and the workers in these schools that in the States of New York and California, they are as protected as in the six States that I mentioned?

Mr. **Kling**. Yes, sir. I think that's why we took the number of steps we did after we promulgated the rule to help school officials, contractors, and others know how to develop a proper management plan.

Mr. **Synar**. Are you doing anything from an enforcement standpoint?

Ms. **Fisher**. Congressman Synar, there's nothing to enforce against the States who choose not to review their plans. We have no legal authority to go against the States and force them to set up that program.

Mr. **Kling**. Sir, that is one of the reasons also that we commissioned the AHERA evaluation.

Mr. **Synar**. So what you're telling me, Mr. Kling, if I could cut to the chase here, is that if you happen to live in the States of Massachusetts, Maine, Vermont, Oklahoma, Nebraska, and Idaho, you can have a little bit better assurance that your kids are protected versus New York and California?

Ms. **Fisher**. Well, I think there's a lot of States that have used the checklist, more than the ones you have named, and have done some review of the management plan. I don't think it's just limited to those six. Obviously, we have more concern about the States that you named that have done nothing.

California actually has developed a program under CAL-OSHA that is going to take responsibility for this program. So, perhaps the future looks a little bit better than it did in the past. I think Dave's point is a proper one, and that is even though EPA did not have the authority to review these plans for quality, we did try to work with the States to get a quality review from them.

Additionally, one of the reasons behind our evaluation was to get a general feeling for what were the strengths and weaknesses that was going on in the country. Give that information back to the LEA's to allow them to compare how their own plans stacked up against where we found problems and begin to take corrective measures to improve their plans.

Mr. **Synar**. Ms. Fisher, what good does it do? It seems like you're a dollar short and a day late if the management plans are in. This is what is going to guide these LEA's from here on.

Ms. **Fisher**. Well, during the whole time that States were implementing or schools were implementing their plan, we did a tremendous amount of technical assistance to the schools.

Mr. **Synar**. But you will agree that in the States of New York and California, that all you did was look for the signature of the LEA representative in the abatement file.

Ms. **Fisher**. No. The issue I was trying to get to was we worked with the LEA's to strengthen their ability to evaluate the plans that they were getting from their inspectors. So we tried to keep as much technical information in the field so that as different school officials were reviewing their own plans, they would be able to make some educated judgments as to whether it was a sound plan or not.

The AHERA inspection requirement basically gave the schools only at first 10 months and then eventually about 16 months to do the management plans. So our ability to catch up and do corrections while those were ongoing would be very difficult. Instead, we chose to communicate constantly with the schools to educate them as to what they should be looking for, what they should expect from their contractors, and we continued to develop the model accreditation plan to be sure we had quality workers out there.

Mr. **Synar**. You will agree this may be an area for new legislation?

Ms. **Fisher**. In what way?

Mr. **Synar**. In the way of trying to get some uniformity?

Ms. **Fisher**. Well, we have tried to——

Mr. **Synar**. State responsibility.

Ms. **Fisher**. In terms of reviewing of the management plan?

Mr. **Synar**. Yes.

Ms. **Fisher**. Yes. That would probably be one improvement that might be helpful.

Mr. **Synar**. Mr. Clinger.

Mr. **Clinger**. Thank you, Mr. Chairman. I'm sorry I was not here to listen to your testimony. I have had a chance to review it, however, and have some questions. If I repeat any questions that you've already been subjected to, let me know, and we'll move on.

Ms. **Fisher**. We'll know the answers.

Mr. **Clinger**. In your testimony, you indicated that approximately 7,400 notices had been issued to schools which failed to comply with AHERA's inspection and management plan requirements on time. Can you give us an idea of how many of these notices went out to schools as a result of your concern with Hall-Kimbrell's inspection and management plans?

Ms. **Fisher**. Most of those notices, Congressman Clinger, went out to schools that failed to even submit a plan in the first instance. It was probably the first set of enforcement actions that we took. Basically, it was to those LEA's that had not done their inspection.

The goal of that was to get them to do a plan and submit it to the State. Some of those may have ended up in the Hall-Kimbrell pile, but I would say the bulk of those were where people just hadn't complied in the first instance.

Mr. **Clinger**. They were not necessarily triggered by the Hall-Kimbrell situation?

Ms. **Fisher**. No, they were not.

Mr. **Clinger**. You stated that the Agency has issued 218 civil complaints against schools to date. Have any of those complaints been issued as a result of EPA's concerns with Hall-Kimbrell?

Mr. **Stahl**. I believe that total would probably include the complaints that we've issued against Hall-Kimbrell.

Mr. **Clinger**. So there were some complaints issued against schools that have contracted with Hall-Kimbrell?

Mr. **Stahl**. No. The number of civil actions that we have been using for the hearing includes those that we've issued against Hall-Kimbrell, not against local education agencies who used Hall-Kimbrell.

Mr. **Clinger**. What does EPA's enforcement action against Hall-Kimbrell mean for the local education agencies that contracted with the firm or that had inspections or management plans conducted by firms, trained by Hall-Kimbrell? In other words, are the schools going to be saddled with additional costs or are they going to be subject to complaints from EPA as a result of that contractual relationship?

Mr. **Stahl**. Actually, we have not too much quarrel with Hall-Kimbrell as a trainer. It was when they were actually doing the inspections and the management plans that I think we ran into difficulty with them. So we're not really, at this point, planning any action in those schools that have been serviced by people that were trained by Hall-Kimbrell.

Mr. **Clinger**. So, the specific question is are the schools that did contract with Hall-Kimbrell, are they going to be subject to additional costs?

Mr. **Stahl**. Potentially. It depends on how the settlement negotiations work out with Hall-Kimbrell. It is possible that the schools may have to go it on their own to pay for the correction of this work.

Mr. **Clinger**. So they could be subject to complaints from EPA?

Mr. **Stahl**. Theoretically, they could be the subject of an enforcement action.

Mr. **Clinger**. As some of you may recall in a previous hearing on this issue, I expressed some concerns that smaller and rural schools, at least from anecdotal evidence that I had from my own district, might have been shortchanged in receiving grants and loans as part of the Asbestos School Hazard Abatement Act.

So I'd appreciate it if you could provide me with an updated listing of the funds that have been provided to LEA's in Pennsylvania, and in particular my district, which contains a lot of rural and smaller school systems. I would appreciate having that.

Ms. **Fisher**. We can provide that.

[The information follows:]

Attached is a comprehensive listing of school districts in Pennsylvania which have received funding through the Asbestos Hazard Abatement Act Loan and Grant Program from 1985 thru 1991. Listed below is a listing of school districts in Pennsylvania within Congressman Clinger's Congressional District which have received funding:

1985 Keystone School District
Knox, PA

Total Award = $154,994.84 (Grant)
$198,885.16 (Loan)

$353,880.00

1985 Port Allegany School District.
Port Allegany, PA

Total Award = $163,651.00 (Grant)
$166,720.00 (Loan)

$330,372.00

1988 Philipsburg-Osceola School District
Philipsburg, PA

Total Award = $15,622.00 (Grant)
$26,601.00 (Loan)

$42,223.00

1988 Dubois Area School District
Dubois, PA

Total Award = $8,711.00 (loan)

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PENNSYLVANIA            * AWARDED LOCAL EDUCATION AGENCIES 1990 [illegible]              4/22/1991
                          ==========================================
                                                                                          Page 1
                                                                                          AMOUNT
LEA        LEA NAME                              LEA    YEARS    FAX NUMBER              RECEIVED
NUMBER     & ADDRESS                             CONG   ROUND
                                                 DIST
======================================================================  ==========================

PAA02130   ALIQUIPPA BORO SCH DIST               04     [illegible]          PRIMARY AMOUNT    80,492.00
           HARDING AVENUE                                                    SECOND AMOUNT    156,927.00
           ALIQUIPPA, PA  15001                                                              ==============
                                                                             ANNUAL AMOUNT    237,419.00

PAA00240   BELLEFONTE AREA SCH DIST                                          [illegible]       26,368.00
           301 N ALLEGHENY ST                                                [illegible]       77,106.00
           BELLEFONTE [illegible]                                                            ==============
                                                                             [illegible]          874.00

PAA00?50   BLAIRSVILLE-[illegible]                                           [illegible]
           195 NORTH WALNUT [illegible]                                      [illegible]           120.00
           BLAIRSVILLE, PA [illegible]                                                       ==============
                                                                             [illegible]           880.00

PAA00750   BLAIRSVILLE-SALTSBURG SCH DIST                                    [illegible]
           195 NORTH WALNUT STREET                                           [illegible]           245.00
           BLAIRSVILLE, [illegible]                                                          ==============
                                                                             [illegible]           215.00

PAA04080   [illegible]                                                       [illegible]
           [illegible]                                                       [illegible]
           [illegible]                                                                       ==============
                                                                             [illegible]

[illegible]                                                                  [illegible]
                                                                             [illegible]
                                                                                             ==============
                                                                             [illegible]

[illegible]                                                                  [illegible]
                                                                             [illegible]
                                                                                             ==============
                                                                             [illegible]           446.00

[illegible]                                                                  [illegible]       [illegible].50
                                                                             [illegible]       [illegible].50
                                                                                             ==============
                                                                             [illegible]           233.00
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                                  * AWARDED LOCAL [illegible]                                              4/23/1991

LEA       LEA NAME                               LEA     [illegible]                                        AMOUNT
NUMBER    & ADDRESS                              CONG    [illegible]                                       RECEIVED
                                                 DIST

PAA03[illegible] CHESTER UPLAND SCH DI           [illegible]                           GRANT AMOUNT        238,778.00
          18TH & PROSPECT AVENUE                                                       LOAN  AMOUNT        238,782.00
          CHESTER, PA [illegible]                                                                     ----------------
                                                                                       AWARD AMOUNT        477,560.00

PAA06[illegible] SCHOOL DISTRICT OF THE CITY OF SCRANTON                               GRANT AMOUNT         32,096.97
          [illegible]                                                                  LOAN  AMOUNT        109,925.03
          [illegible]                                                                                 ----------------
                                                                                       AWARD AMOUNT        142,022.00

PAA06[illegible] [illegible] SCHOOL DISTRICT                                           GRANT AMOUNT              0.00
          [illegible]                                                                  LOAN  AMOUNT         94,806.20
          [illegible]                                                                                 ----------------
                                                                                       AWARD AMOUNT         94,806.20

PAA06[illegible] CONNELLSVILLE AREA SCH DIST     [illegible]                           GRANT AMOUNT          6,599.00
          125 NORTH SEVENTH STREET                                                     LOAN  AMOUNT          6,600.00
          CONNELLSVILLE, PA 154[illegible]                                                            ----------------
                                                                                       AWARD AMOUNT         13,199.00

PAA07030  DUBOIS AREA [illegible]                [illegible]                           GRANT AMOUNT              0.00
          500 LIBERTY [illegible]                                                      LOAN  AMOUNT          8,733.00
          DUBOIS, PA [illegible]                                                                      ----------------
                                                                                       AWARD AMOUNT          8,733.00

PAA09[illegible] [illegible]                     21                                    GRANT AMOUNT              0.00
          [illegible]                                                                  LOAN  AMOUNT     [illegible]2,060.00
          [illegible]                                                                                 ----------------
                                                                                       AWARD AMOUNT     [illegible]2,060.00

PAA09[illegible] ERIE [illegible]                21                                    GRANT AMOUNT              0.00
          1511 PEACH STREET                                                            LOAN  AMOUNT        119,943.76
          ERIE, PA 165[illegible]                                                                     ----------------
                                                                                       AWARD AMOUNT        119,943.76

PAA11[illegible] HARRISBURG [illegible]          [illegible]                           GRANT AMOUNT        426,650.00
          PO BOX 2645                                                                  LOAN  AMOUNT        426,650.00
          HARRISBURG [illegible]                                                                      ----------------
                                                                                       AWARD AMOUNT        853,300.00
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* [illegible]

LEA NUMBER	LEA NAME & ADDRESS	LEA CONG. DIST.	[illegible]		AMOUNT RECEIVED
PAA1[illegible]	[illegible] [illegible] [illegible]			GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	0 00 034,721 00 034,721 00
PAA12720	[illegible] SCHOOL DIST [illegible] [illegible] PA [illegible]	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	114,994 84 190,885 16 [illegible],880 00
PAA13000	LAKE LEHMAN [illegible] RD BOX 2000 DALLAS PA [illegible]	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	7,401 32 12,598 68 20,000 00
PAA13440	LEBANON SCH DIST 1000 SOUTH EIGHTH STREET LEBANON PA [illegible]	16	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	47,341 35 229,508 65 276,850 00
PAA13440	LEBANON SCH DIST 1000 SOUTH EIGHTH STREET LEBANON PA 17042	16	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	0 00 [illegible],019 00 [illegible],019 00
PAA15400	MILTON AREA SCHOOL DISTRICT 700 MAHONING STREET MILTON PA 17847	17	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	247,512 00 370,809 93 [illegible],322 00
PAA1[illegible]	[illegible] SCHOOL DISTRICT [illegible] [illegible]	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	248,258 23 [illegible] 499 41 [illegible],340 64
PAA1[illegible]	NORTH[illegible] SCH DIST R D #1 BOX [illegible] [illegible] PA [illegible]	12	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	8,158 00 8,158 00 16,316 00

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   PENNSYLVANIA                                                              page 4          4/23/1991
                                 * AWARDED LOCAL EDUCATION [illegible] 1985 [illegible] *

LEA        LEA NAME                         LEA   [illegible]   [illegible]                       AMOUNT
NUMBER     & ADDRESS                        CONG  [illegible]                                    RECEIVED
                                            DIST
==================================================================================================

PAC00001  NATIVITY OF OUR LORD SCHOOL       10    [illegible]                 [illegible] AMOUNT    7,170.10
          633 ORCHARD ST                                                       LOAN AMOUNT   15,236.47
          SCRANTON, PA  [illegible]                                                        ===============
                                                                              AWARD AMOUNT   22,406.57

PAC00001  NATIVITY OF OUR LORD SCHOOL       10    [illegible]                 GRANT AMOUNT      199.00
          633 ORCHARD ST                                                       LOAN AMOUNT      871.00
          SCRANTON, PA  [illegible]                                                        ===============
                                                                              AWARD AMOUNT    1,070.00

PAC00001  ST JOSEPH [illegible]             10    [illegible]                 GRANT AMOUNT   27,080.00
          601 N LAUREL STREET                                                  LOAN AMOUNT   28,527.00
          HAZELTON, PA  18201                                                              ===============
                                                                              AWARD AMOUNT   55,607.00

PAC00002  HOLY ROSARY [illegible]           10    [illegible]                 GRANT AMOUNT        0.00
          314 WILLIAM STREET                                                   LOAN AMOUNT   19,417.00
          SCRANTON, PA  [illegible]                                                        ===============
                                                                              AWARD AMOUNT   19,417.00

PAC00004  MONSIGNOR [illegible]             10    [illegible]                 GRANT AMOUNT        0.00
          225 EAST [illegible]                                                 LOAN AMOUNT   11,821.00
          HAZELTON, PA  [illegible]                                                        ===============
                                                                              AWARD AMOUNT   11,821.00

PAC00005  ST ANN'S [illegible]              10    [illegible]                 GRANT AMOUNT        0.00
          [illegible] ST ANN'S [illegible]                                     LOAN AMOUNT   10,916.00
          SCRANTON, PA  [illegible]                                                        ===============
                                                                              AWARD AMOUNT   10,916.00

PAC00006  OUR LADY OF PEACE SCHOOL          10    [illegible]                 GRANT AMOUNT   32,627.00
          400 N ABINGTON [illegible]                                           LOAN AMOUNT   32,627.00
          CLARKS GREEN, PA  [illegible]                                                    ===============
                                                                              AWARD AMOUNT   65,254.00

PAC00006  ST [illegible]                    10    [illegible]                 GRANT AMOUNT   31,494.95
          [illegible]                                                          LOAN AMOUNT   38,806.28
          [illegible]                                                                      ===============
                                                                              AWARD AMOUNT   70,301.23
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* AWARDED LOCAL [illegible] 1985 [illegible]

LEA NUMBER	LEA NAME & ADDRESS	LEA CONG DIST	LOAN ROUND	GRANT NUMBER	[illegible]		AMOUNT RECEIVED
PAA17880	NORTHWESTERN SCH DIST ONE HARTMAN [illegible] ALBION, PA 16401	21	1985	U 850098 010	850104	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	78,497 00 135,976 00 214,473 00
PAA18300	OXFORD AREA SCHOOL DISTRICT 119 SOUTH FIFTH STREET OXFORD, PA [illegible]	16	1985	U 850091 010	850157	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	171,099 20 193,185 80 364,285 00
PAA18990	SCHOOL DISTRICT OF PHILADELPHIA 21ST ST & PARKWAY PHILADELPHIA, PA 19103	[illegible]	[illegible]	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	0 00 5,527,000 00 5,527,000 00
PAA18990	SCHOOL DISTRICT OF PHILADELPHIA 21ST ST & PARKWAY PHILADELPHIA, PA 19103	[illegible]	[illegible]	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	0 00 987,494 00 987,494 00
PAA19020	PHILIPSBURG-OSCEOLA AREA SCH 200 SHORT STREET PHILIPSBURG, PA 16866	23	1985	U 850152 010	850114	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	15,622 00 26,601 00 42,223 00
PAA19500	POCONO MOUNTAIN SCH DIST 200 SWIFTWATER, PA [illegible]	10	1985	U 850150 010		GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	109,750 00 109,750 00 219,500 00
PAA19530	PORT ALLEGANY SCHOOL DISTRICT 200 OAK STREET PORT ALLEGANY, PA 16743	23	1985	U 850012 010	850147	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	163,651 09 166,720 91 330,372 00
PAA21120	SELINSGROVE AREA SCHOOL DISTRICT N. 10TH STREET SELINSGROVE, PA [illegible]	17	1985	U 850021 010	850140	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	298,217 19 350,358 81 648,576 00

• AWARDED LOCAL [illegible]

LEA NUMBER	LEA NAME & ADDRESS	[illegible]	[illegible]	[illegible]	[illegible]		AMOUNT RECEIVED
PAA21810	SOLANCO SCH DIST 121 SOUTH HESS STREET QUARRYVILLE, PA 17566					GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	159.471 00 217.529 00 377.000 00
PAA21810	SOLANCO SCH DIST 121 SOUTH HESS STREET QUARRYVILLE, PA 17566	15	1987 AND 1	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	2.547 00 99.360 00 101.907 00
PAA22800	STEELTON-HIGHSPIRE SCH DIST P.O. BOX 7645 STEELTON, PA 17113	17	1988	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	0 00 91.014 00 91.014 00
PAA24090	UNION CITY AREA SCHOOL DISTRICT 91 MILES STREET UNION CITY, PA 16438	24	1988	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	50.543 21 54.755 15 105.298 36
PAA24990	WASHINGTON SCH DIST 78 WEST MAIDEN STREET WASHINGTON, PA 15301	22	1988	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	0 00 84.612 50 84.612 50
PAA24990	WASHINGTON SCH DIST 78 WEST MAIDEN STREET WASHINGTON, PA 15301	22	1987 AND 1	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	0 00 59.756 00 59.756 00
PAA26300	WILKES-BARRE AREA SCHOOL DISTRICT 730 SOUTH MAIN STREET WILKES-BARRE, PA 18711	11	1988	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	0 00 14.946 92 14.946 92
PA500090	DIOCESE OF SCRANTON, PA 300 WYOMING AVE SCRANTON, PA [illegible]	[illegible]	[illegible]	[illegible]	[illegible]	GRANT AMOUNT LOAN AMOUNT AWARD AMOUNT	0 00 679.195 00 679.195 00

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                                                                              4/23/1991

LEA        LEA NAME                                LEA                              AMOUNT
NUMBER     & ADDRESS                               CONG                            RECEIVED
                                                   DIST
==========================================================================================

PAC00007  ST STANISLAUS                            11             GRANT AMOUNT         0.00
          8TH & CARSON                                             LOAN AMOUNT     12,564.00
          HAZLETON, PA                                                         ==============
                                                                  AWARD AMOUNT     12,564.00

PAC00011  VISITATION SCHOOL                        13             GRANT AMOUNT         0.00
          196 N TROOPER ROAD                                       LOAN AMOUNT     40,465.00
          NORRISTOWN, PA                                                       ==============
                                                                  AWARD AMOUNT     40,465.00

________________________________________________________________________________________

STATE PA TOTALS            [illegible] AWARDS                     GRANT AMOUNT  2,856,756.04
                                                                   LOAN AMOUNT 13,626,726.84
                                                                               ==============
                                                                  AWARD AMOUNT 16,483,483.18
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Mr. **Clinger**. Thank you. Thank you, Mr. Chairman.

Mr. **Synar**. Mr. Cox.

Mr. **Cox**. Thank you, Mr. Chairman. If we could, let's talk about how the States treated whether or not the LEA's management plans properly addressed wallboard. When did EPA send definitive guidance to its regions and the States regarding the status of drywall in the review of management plans?

Ms. **Fisher**. Congressman, when we worked with the States to give them guidance and develop the checklist for what they should be looking for as they reviewed the inspections in the management plans, we did not give an item by item listing of everything that they ought to be reviewing a plan for.

So we did not have a list of materials that would have included wallboard. They did, however, have the 100 Questions which did have a checklist, if you will, in it and it did include the wallboard. So that was out in——

Mr. **Cox**. Again, that's the only information out there at that point?

Ms. **Fisher**. Well, it's rather clear. I don't know that they would necessarily need more.

Mr. **Cox**. Two questions that aren't in fact regulations make that clear to the States?

Ms. **Fisher**. Pardon me?

Mr. **Cox**. In your opinion, 2 questions in a series of 100 questions that do not qualify as regulations from EPA make clear the issue of how to handle wallboard?

Ms. **Fisher**. It ought to make it clear for the States that were looking to see what materials were included. The questions included more than just wallboard. They included a number of items.

Mr. **Cox**. On June 20, 1990, Gina Bushong of EPA's Office of Pesticides and Toxic Substances sent a memorandum to EPA's regional asbestos coordinators regarding "wallboard as suspect ACBM." That memo enclosed a package of materials on the subject. What did the package contain and what was it supposed to tell the regional asbestos coordinator?

Mr. **Kling**. Sir, I don't have that memo in front of me. I'm not sure what was in that package. But I assume it was the various materials that we had that suggested that wallboard could, in fact, contain asbestos.

Mr. **Cox**. What were they supposed to do with those materials since all the management plans had supposedly been submitted more than a year before that?

Mr. **Kling**. Again, I'm not sure. Since we went through the process of developing the 100 Questions and identifying it as a suspect material, we identified a number of suspect materials which we did not compile a lot of evidence for. So, in other words, I think our regional staff was aware of the fact of what these suspect materials were.

Mr. **Cox**. Well, they wouldn't have sent this material out for no reason. Someone must have thought there was some purpose in doing it. I'm just asking what was the reason.

Ms. **Fisher**. The reason was to provide the regional office, that often answers a lot of questions, more information on why we thought wallboard should be included. I think the documents lay out the grounds as to why we thought wallboard sometimes contained asbestos in amounts greater than 1 percent.

Mr. Cox. So, Gina Bushong must have thought there was some confusion in the regional offices of EPA on that issue.

Ms. **Fisher**. There may have been a lot of questions going into the regions. I think it's important as an agency that we give reasonably consistent answers from region to region. That's why we do try to send them as many documents as we can.

Additionally, a variety of questions may have come up. Again, one question is, is it covered? A second question is, why? The information that she provided got more to the why than to whether or not it was covered. That type of information might not have been available to some of the regions.

Mr. Cox. Well, representatives from some of the States visited by this subcommittee staff stated that they had always considered wallboard as suspect material when reviewing the management plans.

Ms. **Fisher**. Good for them.

Mr. **Synar**. Let me, if I could interrupt the gentleman at this point.

Mr. Cox. I yield to the Chair.

Mr. **Synar**. Our subcommittee staff asked State personnel from my State of Oklahoma about this who, by the way, were still reviewing management plans from LEA's when they were interviewed by the subcommittee, Ms. Fisher. They said that word had not filtered down to them until fiscal year 1991, that wallboard was considered a suspect material.

Also, State personnel from Mr. Clinger's State of Pennsylvania said that they had reviewed about half of their management plans before they knew wallboard was supposed to be covered. Now, in any event, all these States and EPA regional personnel we talked to said—and in most instances these States review—if they had occurred, it was basically a paper review.

That as far as knowing whether or not wallboard was to be addressed was a really meaningless question to them because the only way that could be determined was to take the management plan and walk through every school building to see if the walls indeed were made of those materials.

So, it is reasonable for us to conclude, based upon these interviews, that except for those States, if any, that had made an actual visit to the school building and compared that plan to the building, State reviews of management plans offered EPA absolutely no basis whatsoever for judging whether wallboard was addressed by the inspection of the LEA's.

Ms. **Fisher**. I don't think we asserted that it did offer us that basis. I think the point that your States have made is a correct one. That is, for them to do an indepth review of the quality of the management plan, they would have to go out to the schools and compare the plan to what they're finding in the school.

I don't think very many of the States did that. So I think that is true. But the Agency has not necessarily relied on the States' review of those management plans to tell us whether or not they were looking for wallboard or not.

Mr. **Synar**. I think it's important to pin this down. The AHERA evaluation didn't cover whether management plans covered wallboard; did it?

Ms. **Fisher**. The AHERA——

Mr. **Synar**. Mr. Kling, did it?

Ms. **Fisher**. Could you state your question again?

Mr. **Synar**. The AHERA evaluation didn't cover——

Ms. **Fisher**. Oh, our AHERA evaluation. That's correct. It did not.

Mr. **Synar**. Now, let me, if I could, Mr. Cox?

Mr. **Cox**. Certainly.

Mr. **Synar**. On July 14, 1989, Michigan State Department of Public Health rejected all the school inspections and management plans developed for State schools by Hall-Kimbrell because they were considered incomplete. Michigan personnel told this subcommittee again that they visited schools and compared the plans to the building.

In fact, they said they found one school where the plan elaborately described a building that didn't even exist. Now, Michigan personnel subsequently met with Hall-Kimbrell about the deficiencies in these management plans. EPA region V personnel were present at those meetings. Were EPA headquarters personnel advised of the content and outcome of those meetings?

Mr. **Stahl**. I can't say for certain whether the regional office would have communicated with headquarters folks about that particular visit, no.

Mr. **Synar**. Well, EPA region V personnel told this subcommittee that as a result of the meetings between Hall-Kimbrell and the State of Michigan, region V advised EPA headquarters of the situation. Given the far-flung nature of the company's operations, they asked if EPA headquarters wanted to pursue a national settlement with the company.

Region V personnel told this subcommittee that they were advised about a month later that EPA headquarters was not interested in a national settlement, that would have been in the summer of 1989. Do you know who in the EPA headquarters rendered that decision, Ms. Fisher, and why?

Ms. **Fisher**. No, I don't.

Mr. **Synar**. Region V officials said that they then decided to develop their own enforcement case because they could not use Michigan's evidence to support an enforcement case. Now, since EPA does not have a cooperative agreement with Michigan, they went out and developed their own enforcement action against Hall-Kimbrell in Michigan. This is when the region developed a case against Hall-Kimbrell involving the Detroit Catholic schools. Is that correct?

Ms. **Fisher**. That could be. Region V was pursuing cases against Hall-Kimbrell at that time as was region VII, I believe, and VIII.

Mr. **Synar**. So, isn't it the case that by this point in time, late summer of 1989, you at least had reason to believe you had a problem with some Hall-Kimbrell inspections or management plans in region V and region VIII, but you didn't do anything to notify any LEA's that they may have used Hall-Kimbrell, but their plans may be deficient; isn't that correct?

Ms. **Fisher**. Those particular States, I believe, had notified some of the schools that they did have problems. When we have done inspections and found inadequacies in the plans, we have notified those schools. What we did not do at that time, and did not do until recently, is notify all people that might have used that particular company. So, in other words, as we did particular school inspections and found problems, we did notify schools.

Mr. **Synar**. Mr. Cox.

Mr. **Cox**. When did EPA file its initial case against Hall-Kimbrell?

Mr. **Stahl**. In May 1990 region VIII out in Denver filed the first case.

Mr. **Cox**. And EPA sought a civil penalty of $125,000 in that case.

Mr. **Stahl**. That could be correct, yes. If you'll hang on, I've got a case-by-case summary. The first case, region VIII issued 11 civil complaints, totaling more than $1 million for failing to identify and sample suspect asbestos-containing building materials.

Mr. **Cox**. Am I correct that this first case was based on a compliance inspection performed by an inspector from the Colorado State Health Department in Will County, CO, that the inspection was conducted on May 31, 1989? Are we talking about the same case?

Mr. **Stahl**. Yes. That would appear to be correct, yes.

Mr. **Cox**. Just for the record, why did it take 9 months from the time of the inspection until EPA filed its enforcement action?

Mr. **Stahl**. Well, after an inspection is developed, it goes through a process in the region where the inspection report is reviewed to determine what violations were in fact detected. In some cases, during that case development process, we may need more information or may have to confirm certain kinds of evidence. Then the regional counsel will work with the regional asbestos coordinator to make a decision about when and whether to issue the case.

Mr. **Cox**. When did EPA file its next case against Hall-Kimbrell, and what did that case involve?

Mr. **Stahl**. I have a number of cases in May 1990 coming out of region VIII, actually 11 of them, dealing with Hall-Kimbrell.

Mr. **Cox**. There are 11 separate cases?

Mr. **Stahl**. Yes.

Mr. **Cox**. The total amount proposed as a penalty was over $1 million; is that right?

Mr. **Stahl**. It was well over $1 million, yes.

Mr. **Cox**. Apparently, Hall-Kimbrell chose to set up a settlement conference with EPA as opposed to requesting a hearing. Who from EPA conducted the first settlement conference, and when did it occur?

Mr. **Walker**. Mr. Cox, those initial settlement meetings were led by Attorney Kathy Letson, who was an assistant regional counsel in our Denver, CO, region VIII office.

Mr. **Cox**. That conference did ultimately occur; did it not?

Mr. **Walker**. As far as we're aware, yes.

Mr. **Cox**. There are two events that occurred prior to that conference that I'd just like to talk about, if we could. First, the subcommittee has a memo on file dated May 23, 1990, from Cindy Fournier on region VIII's case with Hall-Kimbrell.

Ms. Fournier wrote that Betty Winer from EPA's Environmental Assistance Office had informed her that she surveyed American literature and found that only some drywall by certain companies contains less than 1 percent asbestos and the rest contains none.

Ms. Winer said that in the Canadian literature she found that two major companies formerly produced wallboard containing up to 10 percent asbestos. Ms. Fournier wrote that apparently we import a lot of wallboard from Canada. Now, 10 percent asbestos content is quite a lot, I think we'd agree. Do you know how much wallboard the United States imports from Canada, and what is the source of that information, if you know?

Ms. **Fisher**. We can try and provide it for the record, but I don't think we know today.

[The information follows:]

Question #3 - Information on U.S. Imports of Wallboard from Canada.

The Environmental Protection Agency does not have specific information on U.S. imports of wallboard from Canada. However, we did contact the International Trade Commission (ITC) and they provided the following statistics on the value AND AMOUNTS of gypsum wall board imported to this country from Canada from 1978 to 1988:

YEAR	VALUE	POUNDS
1978	$19,277,000	450,176,089
1979	24,760,000	592.239,206
1980	10,956,000	271,489,590
1981	8,419,000	214,221,801
1982	13,541,000	316,656,605
1983	24,860,000	559,703,115
1984	80,670,000	1,486,702,020
1985	75,992,000	1,296,095,543
1986	96,112,000	1,564,836,371
1987	80,972,000	1,408,301,178
1988	69,220,000	1,242,408,106

These figures came from the International Trade Commission.

The names of importers are not available.

Mr. **Cox**. OK, thank you. To return to Cindy Fournier's memo, she continues "so most dryboard probably does not contain any asbestos. However, the literature put out by EPA suggests dryboard should be considered to be possible asbestos-containing material." Now, does EPA literature therefore suggest it should be considered a possible asbestos-containing material because some wallboard may contain asbestos? Is that the reason?

Ms. **Fisher**. That's correct. Under the statute, asbestos-containing material is any material that contains more than 1 percent. Although much wallboard does not contain any asbestos, some of it does. Some of it contains it in excess of 1 percent. That's why we consider it suspect material. We don't require schools to sample because that might be expensive and unnecessary. But we require them to know where it is so that they don't create a problem unwittingly.

Mr. **Cox**. Well, continuing with Ms. Fournier's memo, she said "another problem is whether the contractor can tell gypsum dryboard from other types of building materials. Hall met with Steve Young, her branch chief, and Gina Bushong. At the meeting the company contended that they could always tell whether the material was gypsum dryboard by tapping it.

"Betty said that this did not rise to the level of scientific evidence. Evidently, Steve Young told Hall that they would have to submit some sort of evidence on this, and that's where the situation is today. Hall has never submitted any real evidence, but Betty thinks that they might be thinking that EPA needs to contact them first." Now that's the end of the quotation from the memo.

My first question is, does that reference to Hall mean Hall-Kimbrell?

Mr. **Walker**. As far as we're aware, yes.

Mr. **Cox**. OK. When did the meeting referred to take place? Was that the fall 1989 meeting that you talked about earlier, that she was referring to?

Ms. **Fisher**. I'm not sure.

Mr. **Kling**. I'm not sure.

Mr. **Cox**. Well, is she here in the room?

Ms. **Fournier**. Yes, it was.

Mr. **Cox**. It was the meeting, OK. Didn't EPA ask Hall-Kimbrell at that meeting, I think you said earlier, to submit additional material regarding drywall to EPA after the meeting? Didn't the company do that?

Ms. **Fisher**. Did EPA request them? I don't think we have anybody in the room that was actually at the meeting, which is——

Mr. **Cox**. Well, somebody earlier said that——

Ms. **Fisher**. We think we did ask them.

Mr. **Cox**. You think you asked that?

Ms. **Fisher**. Since I don't have anybody in the room that was actually at the meeting.

Mr. **Cox**. Do you know whether or not they did, whether you asked them to or not?

Ms. **Fisher**. I don't believe they did.

Mr. Cox. Is there anybody in the room who made any review of information provided by Hall-Kimbrell subsequent to the October 1989 meeting?

Ms. **Fisher**. Not to my knowledge.

Mr. Cox. Well, Mr. Brandner, on June 14, 1990, you authored a memorandum to Vince Giordano of EPA headquarters Toxic Litigation Division and to the regional asbestos coordinators in EPA regions V in Chicago and VIII in Denver. You stated that the memorandum was prepared at the addressees request and was an attempt to find any and all references to wallboard, sheetrock, drywall, gypsum board, or plaster in Hall-Kimbrell's training manuals and videotapes.

In the memorandum you conclude "these references plus others indicate that Hall-Kimbrell was training its own employees and others to treat wallboard as suspected asbestos-containing material since the beginning of the AHERA program. Even recent Hall-Kimbrell training materials suggest that drywall may be asbestos containing."

Mr. Brandner, would you describe the materials you reviewed and the specific references which led you to that conclusion in that memorandum?

Mr. **Brandner**. Certainly. Hall-Kimbrell was one of about 35 companies in region VII which consists of Iowa, Missouri, Kansas, and Nebraska that is involved in conducting AHERA training, specifically for inspectors and management planners, as well as the other categories. The material that I'm referring to is material that I reviewed in the approval process for Hall-Kimbrell.

In that material is information about wallboard. Wallboard is defined as being various substances, including gypsum wallboard, and some of that material could be asbestos containing. It is also present in some of the videotape material. To date, there has never been an amendment made to that training material or a retraction made of what was submitted and what I approved in, I believe, September or October 1987.

Mr. Cox. So that the materials you reviewed for that memorandum related to materials provided through the application process and would not have been materials provided in response to an EPA request after this October 1989 meeting?

Mr. **Brandner**. No. It has nothing to do with the 1989 meeting.

Mr. Cox. OK. Returning to the June 19, 1990, settlement conference, at that conference or shortly thereafter, Hall-Kimbrell and PSI representatives told EPA region VIII personnel that the company had conducted AHERA inspections in 47 States involving 1,300 LEA's and 45,000 buildings. Is that correct?

Ms. **Fisher**. As far as we know it's correct.

Mr. Cox. So EPA enforcement personnel knew more than 15 months ago the wide scope of Hall-Kimbrell's AHERA activities. What was the result of the June 19 settlement conference?

Mr. **Walker**. That was the region VIII conference. It's our understanding that no settlement was reached at that time.

Mr. Cox. On June 25, 1990, representatives of PSI, which in December 1989 had bought Hall-Kimbrell, held a meeting with someone at EPA headquarters to discuss policies regarding the suspect nature of drywall and wallboard systems. Neither the region VIII attorney handling the case, Kathy Letson, nor other EPA counsel were invited to or informed about the meeting.

Who in EPA arranged for the meeting and why weren't EPA enforcement personnel invited? This case was pending at the time, so it's obvious why the question.

Ms. **Fisher**. Congressman, we'll have to check and see.

[The information follows:]

Question #4 - Information on the 6/25/90 Meeting with PSI at EPA

For the record, it should be noted that top level PSI executives were in Washington on June 25, 1990 for other purposes and placed an impromptu call to Steve Young, Chief, Government Liaison Branch, Environmental Assistance Division, Office of Toxic Substances to request a meeting. PSI requested the meeting to discuss the Agency's wallboard policy. EPA representatives from Region VIII were in Washington for an EPA Regional Asbestos Coordinators/National Emissions Standard for Hazardous Air Pollutants Coordinators meeting, therefore, they were invited to attend. Our recollections of the meeting do not reflect if the Office of Enforcement was invited to attend or if they were unable to attend. To the best of our knowledge the following persons were in attendance.

Jim Alberle, President of PSI
Stan Stanley, PSI
Tim Young, Attorney engaged by PSI
Dave Combs, Region VIII Asbestos Coordinator
Kathy Letson. Region VIII Attorney
Bob Harding, Region VIII, Chief, Toxics Section
Steve Young, EPA - Office of Toxic Substances
Gina Bushong, EPA - Office of Toxic Substances
Betty Weiner, EPA - Office of Toxic Substances

Mr. Cox. Well, Ms. Letson of region VIII just happened to be in Washington on June 25 and happened to hear of the meeting with PSI and managed to get herself invited to attend. But you don't know who else was in attendance at that meeting; is that right?

Ms. **Fisher**. I can find out for you. I just don't know today.

Mr. Cox. What was the result of the meeting?

Ms. **Fisher**. I would have to check.

Mr. **Walker**. Congressman, one result of the meeting was that Ms. Letson sought a protective order from the administrative law judge directing that Hall-Kimbrell and their attorneys no longer come to Washington to forum shop the Agency or the Congress for matters relating to this action, this enforcement action, that they were to deal with her exclusively on those 11 cases.

Mr. Cox. Well, why was it necessary to obtain a protective order? Couldn't EPA just not talk to them? I just don't understand the process here. Why is it that you would have to obtain a protective order so that they don't talk to you?

Ms. **Fisher**. I think, first of all, you don't have to get a protective order. I think that Ms. Letson was concerned that those attorneys were going around her to get to all different people in Washington to set up meetings where they could discuss their issues. We tried to coordinate a lot of those meetings with her, but what she really wanted to do, I think, was put some constraints on their behavior.

Mr. Cox. What action did the administrative law judge take with respect to your protective order request?

Mr. **Walker**. In effect, it's never been granted. It's still pending.

Mr. Cox. Thank you, Mr. Chairman.

Mr. **Synar**. Thank you, Mr. Cox. Let me go back where I was and talk about this region V and region VIII again. Now, you hadn't done anything to notify these LEA's that they may have used Hall-Kimbrell and that their plans might be deficient. You told me that you basically left that up to the States to notify them; is that correct?

Ms. **Fisher**. We left it up to the States after they reviewed different management plans to contact the LEA's where they've had problems with those management plan to get the improvements to them.

Mr. **Synar**. Now, Hall-Kimbrell had actually told EPA headquarters in January 1989, in a letter, that the company's inspections didn't address wallboard; isn't that correct, Ms. Fisher?

Ms. **Fisher**. That's correct, I believe.

Mr. **Synar**. Despite your knowledge at that point in time that you might have a problem with at least two regions with the largest company doing AHERA work, if not many others as well, EPA headquarters did nothing to notify its other regions or States that at the time were in the middle of reviewing all these management plans, that they might need to focus on certain possible deficiencies, at least with respect to wallboard; is that correct?

Ms. **Fisher**. I think that's correct.

Mr. **Synar**. Well, if you're so concerned, Ms. Fisher, about the health and safety of the children in these schools, as you recently stated in the trade press, how do you account for the fact that you didn't notify any other regions or States or LEA's about this potential problem back in 1989?

Ms. **Fisher**. Congressman, we did not notify the schools at that point in time that there might be problems with management plans done by Hall-Kimbrell. I should point out that in terms of asbestos-containing materials, we don't consider wallboard one of the higher risk materials. In other words, a lot of it, as we discussed earlier today, does not contain asbestos. We are concerned about it because some of it does. But it is not, from our perspective, one of the higher risk materials.

Mr. **Synar**. Well, let me just see if I've got this straight. You were so worried about the children that you waited until a few days before the school year began this year, 2 years later, to even notify some of the LEA's that there might be a problem with their plans.

Then, if I've got this correct, to add insult to injury, you finally send a notice to these LEA's, which is more like a threat, really, that you tell them that they have only 30 days what are to be quoted in the press as calling "one last chance" to correct any deficient plans. I'm quoting you again now or "they are likely to be looking at fines and penalties themselves." Is that the gist of this thing right here, Mr. Walker?

Ms. **Fisher**. If I could, first of all, we believed off and on that we were going to actually have a settlement with Hall-Kimbrell. That settlement was going to entail rework or improvements on a lot of these plans. One of the reasons we did not feel it necessary to deal with the schools was because we held out some hope of a settlement that would get the work underway.

That fell through and this summer we were less optimistic that we would have a settlement. We thought it was important to inform those schools that they may have problems with their plans. As they are going through the reinspection, they may want to again check and see whether they have problems with their particular school plans.

Mr. **Synar**. Ms. Fisher, the point is that you waited 2 years to notify them of potential problems. Now you're asking them to jump to your tune within 30 days; is that not correct?

Ms. **Fisher**. I don't recall I gave them any kind of 30-day deadline. We did inform the schools that under the law they are responsible for the development and submission and implementation of a plan. The fact that we may have problems with Hall-Kimbrell as a contractor does not take them off the hook.

So we were trying to lay out for them that although we were still hopeful or still pursuing Hall-Kimbrell in a way that might be able to get that rework, we needed to remind them that under the law they are responsible for the work. I don't recall the mailing that I sent to them having a 30-day deadline in it.

Mr. **Synar**. Let's try to clarify something about these LEA's whose original inspection reports may be deficient. Ms. Fisher, in your testimony, you state that EPA is developing detailed guidance for schools on how to conduct their AHERA reinspections which are due by July of next year.

Now, you state in this guidance "will alert schools to look for materials commonly missed in the initial AHERA inspections and identify other ways in which schools can improve their inspection grade. For example, reinspection is an opportunity for schools to have the original inspection report reviewed and corrected should their be deficiencies in the identification and assessment of asbestos-containing materials."

Now, I must be reading this wrong. This statement implies that the LEA's have "an opportunity" before next July to review and correct original inspection reports which are deficient because they didn't cover some commonly missed mistakes.

But in the case of those schools we just talked about, those which got your recent notice, you're saying EPA is going after them with fines and penalties if they haven't corrected their deficiencies in their original inspections by the end of the month. What gives here?

Ms. FISHER. I think you're confusing two different issues. First of all, what we have told the schools is that as they go through their reinspection, they have——

Mr. SYNAR. Some schools?

Ms. FISHER. All schools——

Mr. SYNAR. All schools.

Ms. FISHER [continuing]. Have an opportunity because they will have an accredited person on site, oftentimes the same company that did the original inspection. They will have the opportunity to have them correct the original inspection at the same time they are doing the reinspection. That is an opportunity all schools have, whether they used Hall-Kimbrell or whether, when they get our evaluation and they compare it to their own plan, they see they have some shortcomings.

The reinspection is the time they will have an accredited person going back into the school. Oftentimes, again, it will be the same person that did the inspection in the first instance.

Mr. SYNAR. How does that jive with the fact that you're saying they got one last chance, and they're likely to be looking at fines and penalties themselves, and under the statute, that's 30 days from now?

Ms. FISHER. I'm not sure I said to them they have one last chance.

Mr. SYNAR. Mr. Walker, didn't you say that?

Mr. WALKER. Certainly. The schools are eligible for enforcement actions right now, right now today.

Mr. SYNAR. But they really don't have "this opportunity"; do they?

Mr. WALKER. But that's if we fine them with the deficiencies. Obviously, we're not going to get to all 100,000 schools during our inspection cycle this year. Many schools can correct them before we inspect in 1992, 1993, 1994, 1996.

Mr. SYNAR. So it's an opportunity not a requirement; correct?

Mr. WALKER. It's an opportunity to correct them, absolutely.

Mr. SYNAR. But not a requirement?

Mr. WALKER. It's a requirement that they have a management plan in place right now.

Mr. SYNAR. Ms. Fisher, you discussed the 198 schools which Westat went back and inspected to use as a basis of your AHERA evaluation. In your testimony you state that 21 percent of the 198 schools scored a D or an F. In other words, their original inspection and management plans were deficient enough that you failed them.

Now, is EPA planning to take enforcement action against those schools?

Ms. **Fisher**. No, Congressman. It was one of the grounds for participating in the evaluation. We're not going to go after schools on an enforcement basis and instead provided the benefit of the evaluation to allow them to improve their own school plans.

Mr. **Synar**. So why are you threatening to take enforcement against Hall-Kimbrell schools but not these schools?

Ms. **Fisher**. I think the issue is we wanted to set up a statistically-valid sample of schools. We thought we would get much better cooperation from the schools if we were not going to follow up our evaluation with an enforcement action.

Mr. **Cox**. You did look at wallboard in that evaluation; did you not?

Ms. **Fisher**. No, we did not. We tried to target the materials that we were most concerned about in terms of risk.

Mr. **Cox**. Let me see if I've got this straight. Your biggest lawsuit today involves wallboards, but you didn't look at wallboards in this case?

Ms. **Fisher**. The biggest lawsuit today involves a number of issues against Hall-Kimbrell, one of which is wallboard.

Mr. **Cox**. But since it is involved in that case, you didn't look at it in this case?

Ms. **Fisher**. We did not look at it in the evaluation. We looked at a number of other materials that we thought were more important. Secondly, because of the volume of wallboard in schools, we were concerned that the mere assessment of it would be a rather expensive initiative and it wouldn't give us a whole lot of information since it's one of the materials that oftentimes doesn't even contain asbestos. So we thought there were more important parts of the program to focus on than just wallboard.

Mr. **Synar**. Mr. Cox.

Mr. **Cox**. Thank you, Mr. Chairman. Just following up with the whole process of dealing with Hall-Kimbrell and the litigation, you now have a request for a protective order but no order has been received. Is it correct that there was a second settlement conference between EPA and Hall-Kimbrell and PSI held in Denver on September 5, 1990?

Mr. **Walker**. That's correct, yes. That's correct, Congressman.

Mr. **Cox**. Between July 2, 1990, when Ms. Letson of region VIII filed for a protective order, and the second settlement conference with Hall-Kimbrell and PSI, was there any other correspondence between EPA and Hall-Kimbrell regarding the case, and were other internal EPA documents prepared bearing on the case?

Ms. **Fisher**. There may have been documents prepared on the case. I'm not aware of meetings that would have taken place. In response to the concern raised by the region VIII counsel, we did try to do a better job of coordinating any kind of communication with Hall-Kimbrell. In other words, there are ways to accomplish your goals without just protective orders.

Mr. **Cox**. On September 6, 1990, Ms. Letson sent a memorandum to Mr. Walker at headquarters concerning the settlement meeting with Hall-Kimbrell and PSI on September 5, and said that details of a national settlement were discussed. Ms. Letson appeared upbeat about the meeting.

She said "with your blessing and help, I think that we have managed to negotiate a great settlement. Here are the details. For obvious reasons, please keep these confidential until we have informed the regions of them. There is a need to move fast." What terms did Hall-Kimbrell, PSI, and EPA agree on at this second settlement meeting?

Mr. **Walker**. Well, my understanding, and this is speaking in general since we don't want to get into the specifics of the settlement, is that they did agree to pay a civil penalty and that they did agree to perform reinspection activities at schools where they had done contract work in the prior several years.

Mr. **Cox**. Was there anything included in the settlement that involved the cost of those reinspections?

Mr. **Walker**. I believe that Hall-Kimbrell submitted an estimate of what they expected the reinspections would cost the company, which I believe is in the memo.

Mr. **Cox**. What about who pays the cost?

Mr. **Walker**. Our understanding was that Hall-Kimbrell would absorb the cost of the reinspection and rework activities.

Mr. **Cox**. Now, while region VIII was pursuing their case with Hall-Kimbrell, were other EPA regions also developing enforcement cases against the company?

Mr. **Walker**. Yes, I believe so.

Mr. **Cox**. Was one of them region V in Chicago at the time?

Mr. **Walker**. I was not aware that they had a case under development until much later in the process.

Mr. **Cox**. Do you know what their case involved or what they were working on?

Mr. **Walker**. I believe it involved the Diocese of Detroit.

Mr. **Cox**. Is it accurate to state, rather than to go all through the specifics, that the complaint of region V was broader than the one developed by region VIII?

Mr. **Walker**. Are you referring to the charges that they would have sought?

Mr. **Cox**. Yes.

Mr. **Walker**. I believe so, yes.

Mr. **Cox**. Did region V also propose to subpoena Hall-Kimbrell records? If so, why?

Mr. **Walker**. I'm not aware of a subpoena.

Mr. **Cox**. After the September 5 settlement conference, how did EPA internally approach a national settlement with Hall-Kimbrell and PSI?

Mr. **Walker**. In September 1990, the EPA headquarters, the Office of Compliance and Monitoring, and my office, the Office of Enforcement, issued a directive to the regional offices to look for specific problems with Hall-Kimbrell in the 10 regional offices with the goal of nationalizing a settlement with this company.

We were convinced at that time that there were problems in more than one region, and that we wanted these problems addressed in a consistent fashion across the country. Any time we seek to negotiate a national settlement with a company, we want to be certain that we know as much as we can about the company and about the violations and in particular about the relief that we may in fact be getting in the settlement agreement.

In other words, we don't want to settle a case, have one region settle a case, and then find out several months down the road that there were similar violations in a number of the other regions.

Mr. Cox. Did you prepare a memo along with Connie Musgrove on or about November 14, 1990, addressing that?

Mr. **Walker**. Yes, absolutely.

Mr. Cox. Addressing those issues that you just described?

Mr. **Walker**. That's correct.

Mr. Cox. Mr. Brandner, let me just ask you a question, if I could. You commented on the original draft of the proposed national settlement with Hall-Kimbrell and PSI. What were your concerns? I mean, we're not here to tell EPA how to settle its enforcement cases. But Mr. Walker has suggested the goal is to get PSI to redo bad plans for free.

From Ms. Letson's memo it sounds like that's what LEA's would get with the proposed settlement. Any deficient inspections would be redone without charge. Why were you concerned about that approach?

Mr. **Brandner**. I think if you're referring back to the time of September 1990, at that particular point of the negotiation the settlement that was presented to region VII did not really include a comprehensive revisit of all schools within the Nation. That's the best of my recollection. That is why I expressed concern that the Agency was considering reducing the penalty by more than 91 percent for what I considered no benefit.

Mr. Cox. So your concern wasn't with redoing the inspections but the small number of inspections that would in fact be redone?

Mr. **Brandner**. To the best of my recollection, I couldn't see a rework of the schools as being part of that settlement.

Mr. Cox. Were you concerned that the reinspection would be confused with the rework to be done and who would pay for it?

Mr. **Brandner**. No. I think what I'm looking at is that we had 1,300 school districts and supposedly over 7,000 individual schools, something like 33,000 buildings that were involved nationwide in the Hall-Kimbrell program.

In September 1990, the best of my recollection, the settlement agreement did not specifically state that Hall-Kimbrell was willing to revisit all of those school districts and all of those schools and all those buildings and redo the management plans.

At the same time, there appeared to be in this settlement offer a reduction in excess of 91 percent of the penalty. At that particular point, I felt that the reduction in penalty was too great for whatever benefit the schools would obtain.

Mr. Cox. Well, Mr. Walker, referring to your November 14 memo, what was the gist of that memo? What was the purpose of it?

Ms. **Fisher**. Which memo was it? There were a number that went out in November that dealt with—a couple, I think, dealt with making this a national case. Another dealt with similar AHERA cases and consulting with headquarters before people could bring cases against other——

Mr. Cox. This is a memo dated November 14.

Mr. **Walker**. Yes. I have it in front of me now. Thank you, Congressman. This was the memo that established the national settlement process for Hall-Kimbrell. It directed that a negotiation team would develop a strategy to address the scope of Hall-Kimbrell violations and how these violations would be handled during settlement negotiations before the first settlement conference would begin with the respondent.

The negotiation team then would be responsible for developing and submitting drafts of the proposed consent agreements and consent orders to each region and headquarters for comment prior to their submission to the respondent. It established that once the settlement had been signed by both the EPA and the company, it would be filed simultaneously in the regions that had pending enforcement cases or cases in active development at that time.

Mr. **Cox**. They would withhold further action on those while that went forward?

Mr. **Walker**. That's correct.

Mr. **Cox**. So the enforcement case that region V had developed regarding the Catholic schools in Detroit and any other cases which other EPA regions had been developing against Hall-Kimbrell were, in essence, put on the back burner while this national settlement was being considered. Is that right?

Mr. **Walker**. No. I wouldn't say put on the back burner. They were brought into the active process of negotiation. Region V, region VII, were made partners in the negotiation team.

Mr. **Cox**. None of those cases, though, were filed at that point; is that right?

Mr. **Walker**. That's correct.

Mr. **Cox**. While this was going forward, did you notify the Catholic Archdiocese of Detroit that EPA believed that 181 of its management plans were deficient? If so, how did you do that?

Mr. **Stahl**. I don't believe that EPA notified the Detroit Archdiocese. I can check whether the State of Michigan might have, as a result of their management plan review, tipped off the Detroit Archdiocese that there were plans in their management plans.

Mr. **Cox**. Was delegation to the regions for approval of this type of multiregional case a normal event at EPA?

Ms. **Fisher**. Delegation to the regions of enforcement cases is a normal event at EPA, yes.

Mr. **Cox**. Thank you. Thank you, Mr. Chairman.

Mr. **Synar**. Thank you, Mr. Cox. Ms. Fisher, when did EPA finally send the consent agreement order to Hall-Kimbrell and PSI?

Mr. **Walker**. The first draft settlement involving the national settlement, as we've been referring to it, was given to the company, I believe, immediately before Christmas 1990.

Mr. **Synar**. What transpired internally within EPA between the November 14, 1990, letter to the regions concerning the case and the December 21 letter, I think you just referred to, that was sent to Hall-Kimbrell and PSI?

Mr. **Walker**. We conducted a number of internal conference calls with our regional offices. We had a meeting in Dallas, TX, involving the regional principals that were involved in the case, both attorneys, program managers, and asbestos regional coordinators.

There were, I believe at the time, at least weekly conference calls with the various regions to discuss what should go into the settlement agreement.

Mr. **Synar**. But the purpose of it was to reach some kind of agreement on the document?

Mr. **Walker**. Oh, yes, absolutely. That, in fact, now that I recall it, was delivered Christmas Eve to Mr. Weiland, the counsel for Professional Services, Inc.

Mr. **Synar**. Mr. Walker, what were the disagreements among the regions and headquarters?

Mr. **Walker**. The disagreements had to do with what constituted an acceptable management plan.

Mr. **Synar**. Now, on November 20, 1990, Connie Musgrove of the Office of Compliance and Monitoring, issued a memorandum to EPA's regional division director concerning the consultation process with AHERA and other person cases. First, what is an "other person" under AHERA?

Ms. **Fisher**. Basically, it encompasses the people that do a lot of the work, the contractors.

Mr. **Synar**. So it could be non-LEA consultant workers?

Ms. **Fisher**. It would be non-LEA consultants.

Mr. **Synar**. Is there a problem under AHERA in bringing action against these parties other than LEA's?

Ms. **Fisher**. The other persons are responsible under TSCA title I not under AHERA itself. AHERA itself focuses on enforcement actions against the schools.

Mr. **Synar**. What did Ms. Musgrove's memo discuss?

Ms. **Fisher**. Her memo discussed the fact that prior to bringing cases concerning other person violations against companies, we wanted the regions to come in and consult with both my office and the Office of Enforcement to be sure that we were getting consistent interpretations of the term before we went out and filed cases.

Mr. **Synar**. What were the areas that you all felt the enforcement response policy needed clarifying?

Ms. **Fisher**. Pardon me?

Mr. **Synar**. What did you feel needed clarifying in your response?

Ms. **Fisher**. Well, in response to a memo that Wolfgang had put together, we realized there were a number of areas that regions might be looking at inconsistently. Based on that, we thought we needed to have more consultation before the regions went out with certain civil complaints.

Mr. **Synar**. Mr. Brandner, why don't you summarize for us what issues were out there?

Mr. **Brandner**. Well, I think as a result of an annual regional review that was performed in May 1990, region VII had the opportunity to get with the other nine regions and present to headquarters a list of difficulties that we had all encountered in trying to enforce the EPA regulations.

Those that we thought were most serious were those dealing with response actions, in other words asbestos abatement activities, and the method in which asbestos worksites are determined to be clean and ready for reoccupancy. There are many other issues, but those were the ones of main concern to us.

We developed about a 50-page document which goes into a lot of detail about things that we believe need to be fixed either through policy statements or, in some areas, rule amendment.

Mr. **Synar**. Now, in the November 20 memo, it states, "in addition, based upon the Hall-Kimbrell case, it came to our attention that our national asbestos contractors may have asbestos violations which could cross regional boundaries." Now, who were the other national asbestos contractors referred to, and what were those enforcement issues?

Mr. **Stahl**. The primary example of another company that crossed regional lines where we were starting to find certain problems was a group called Roth.

Mr. **Synar**. On December 19, 1990, Connie Musgrove issued another memo to regional toxics divisions directors. In that memo she requested that each regional office contact the States within their region to identify any asbestos activities that were performed by Hall-Kimbrell.

Were all EPA regions able to obtain information from all the States within their region regarding Hall-Kimbrell and specifically the number of management plans prepared by the company?

Mr. **Stahl**. Mr. Chairman, apparently we got responses from others with respect to what kinds of activities were being done by Hall-Kimbrell and their respective regions.

Mr. **Synar**. Because some States just didn't even have a data base to answer that question; did they, Mr. Stahl?

Mr. **Stahl**. Some States did a better job than others of collecting and maintaining the data about management plans; that's true.

Mr. **Synar**. So even when the responses to this memorandum were tabulated, EPA still did not have complete information on all the schools where Hall-Kimbrell had prepared management plans; is that correct?

Mr. **Stahl**. At that point, I believe that's true.

Mr. **Synar**. Now the December 19 memo also requested that the regions work closely with their States to identify other major contractors who performed asbestos activities for a large number of LEA's within the States and across these regional boundaries.

They wanted them to determine whether the States had disapproved any management plans that were completed by such contractors. What contractors were identified through this request, Mr. Stahl?

Mr. **Stahl**. We were apparently told at that time by one of our regions that in Massachusetts there were three companies, one of which was, in fact, Hall-Kimbrell where we were noting deficiencies in management plans that had been prepared by those companies.

Mr. **Synar**. Have enforcement cases been brought against any of these national asbestos contractors as a result of possible violations?

Mr. **Stahl**. Other than Hall-Kimbrell? At this point, no.

Mr. **Synar**. Why not?

Mr. **Stahl**. The other case that we have brought against a company that crosses State lines, of course, is Roth. But that was not one of the ones that we were informed about in this particular response.

Mr. **Synar.** But why not?

Mr. **Stahl.** Why not about Roth?

Mr. **Synar.** Why not about the other one if there are possible violations here that Ms. Musgrove alluded to in her 1990 memo?

Mr. **Stahl.** I would have to check whether there are cases pending or being developed in the region on those. That was back in February. It may be getting close to the point where a decision has been made to either go or not go with those cases.

Mr. **Synar.** Well, you may have enforcement cases that are going to be brought?

Mr. **Stahl.** That's possible.

Mr. **Synar.** Why have they taken so long if you knew about the possible violations then?

Mr. **Stahl.** Some of the information that I've been given indicates that for some of the companies that were identified as a part of this response, the State of Massachusetts apparently spent some time getting the contractors to go back and fix the management plans outside the scope of any enforcement action. So if there are other companies where that has not taken place, we may have an action under development.

Mr. **Synar.** Back to the proposed consent agreement, how did this agreement differ from the national settlement Kathy Letson discussed at Hall-Kimbrell and PSI in September 1990, Ms. Fisher?

Ms. **Fisher.** Congressman, I just wanted to come back. There are a number of cases that we have against certain companies filed in the different regions which we can give you a copy of.

Mr. **Synar.** Will you make that available?

Ms. **Fisher.** Hall-Kimbrell is not the only one that we've gone after.

Mr. **Synar.** Answer my question. How did this agreement differ from the national settlement Kathy Letson discussed with Hall-Kimbrell and PSI in September 1990?

Mr. **Walker.** Well, Mr. Chairman, the proposal that Kathy Letson had reduced to writing in September was just a proposal. To my knowledge, she had not gone into actually reducing the settlement to writing in a consent agreement format. It was simply a memo memorializing conversations she had had with counsel for Professional Services, Inc.

Mr. **Synar.** So what you're saying is that it was more specific?

Mr. **Walker.** What we have now—yes. What we gave to the company on Christmas Eve was more specific.

Mr. **Synar.** At the time of this proposed consent agreement, consent order that was given to Hall-Kimbrell and PSI, did EPA know that Hall-Kimbrell was already marketing its services for the triennial reinspections at LEA's, including the very LEA's which were affected by the present consent order?

Mr. **Walker.** I don't believe we knew that in December, but we learned that in January or February 1991. This caused us a great deal of concern.

Mr. **Synar.** To say the least. So you have a situation here where Hall-Kimbrell and PSI is going back to the very schools to which EPA alleges the company has performed deficient inspections and prepared deficient management plans. Now, at this point, the reinspection is only required to cover areas where the management plan identified as friable or nonfriable asbestos-containing material.

Since Hall-Kimbrell did not identify wallboard as a suspect material, it would not be covered by the reinspection. Thus, the school is going to pay for a reinspection of a deficient inspection. The school would have to pay the company twice and still wouldn't have a management plan that identifies asbestos-containing material as defined by EPA.

Is that an accurate summary of the situation, Mr. Walker or Ms. Fisher?

Ms. FISHER. That is correct. The reinspection under the rule only requires schools to go back and reinspect material that was identified in their first inspection. That's one of the reasons we thought getting the information that we developed through our evaluation out to the schools quickly was important, so that they could try to correct their inspections as part of their reinspection.

Mr. SYNAR. As of December 1990, EPA still didn't have accurate information on where Hall-Kimbrell performed all it's AHERA work; is that correct?

Mr. WALKER. That's accurate.

Mr. SYNAR. If you were concerned about these kids, Mr. Walker and Ms. Fisher, and about getting some sort of notice to the LEA's, and Hall-Kimbrell would provide you the information voluntarily, why didn't you just subpoena Hall-Kimbrell early on on names and locations of schools where they had prepared management plans?

Wouldn't that have given you at least a chance to give the LEA's some time to go back and check their management plans for deficiencies in order to protect themselves?

Mr. WALKER. In retrospect, I would have issued a subpoena in September 1990, Congressman. We were told by the company repeatedly we will give you the list. We had always thought settlement was right around the corner and that they were negotiating in good faith.

I might add that while we did issue a subpoena this June for the schools, we have yet to get an accurate and complete list.

Mr. SYNAR. Mr. Cox.

Mr. COX. Thank you, Mr. Chairman. When did Hall-Kimbrell and PSI first respond to EPA's proposed consent agreement?

Mr. WALKER. I believe it was sometime in the month of January 1991.

Mr. COX. What was discussed at that meeting?

Mr. WALKER. Following giving them a document in December, we met with the company in our region V Chicago office either—I'm sorry, it was March 18 and 19, 1991, in Chicago. Prior to that time, we had exchanged correspondence with the company and had a number of conference calls with our regional offices leading up to that settlement meeting.

Mr. COX. Was there a discussion with Kathy Letson of the EPA region VIII and PSI counsel Mark Weiland with regard to problems Hall-Kimbrell was having with the State of Illinois over management plans and the penalty calculation, if you know?

Mr. WALKER. I'm sorry, I don't know.

Mr. Cox. Are you aware of whether or not there was also a discussion of the number of members of the EPA negotiating team, and that Mr. Weiland thought it was a little cumbersome?

Mr. WALKER. Well, yes. That was an issue that was raised repeatedly by Mr. Weiland and PSI, that we had too many people involved. On the other hand, we are concerned that we have full participation by our regional offices because they in fact are going to be involved in following up the implementation of the consent agreement or you're dealing with potentially 1,300-plus management plan fixes. They have to be involved.

Mr. Cox. As I understand it, copies of region V's draft complaint were provided to Mr. Weiland. Copies of region IV's draft complaint were provided to Mr. Weiland during that period of time prior to the March settlement conference. Do you know who copies of those complaints were provided?

Mr. WALKER. I believe they were provided in order to demonstrate to Mr. Weiland in the context of settlement negotiations what the nature of the agency's problems were with the conduct of their work, and so they would understand exactly what would be filed if, in fact, the settlement negotiations proved fruitless.

Mr. Cox. Did Mr. Weiland at some point request that the negotiating team be reduced to three?

Mr. WALKER. Oh, repeatedly.

Mr. Cox. What was EPA's response to that?

Mr. WALKER. We insisted on having a representative of each region on the negotiating team. They brought a number of people to the meetings. They now have at least three or four law firms representing them. We're not certain who to deal with with the company anymore.

Mr. Cox. Well, it's the subcommittee's understanding that on February 25, 1991, Ms. Letson wrote to Mr. Weiland and said that EPA had received no response to its December 20 settlement offer, and asked that EPA receive a written response on or before March 8; is that right?

Mr. WALKER. I believe that's accurate, yes.

Mr. Cox. Did EPA ever request financial data from Hall-Kimbrell?

Mr. WALKER. We had a number of telephone conversations with Mr. Marzulla who was representing Hall-Kimbrell at that time. We wanted something in writing so that we could transmit it to the various regional offices that were involved in the negotiations of this settlement. That's why that letter went out, as I recall it.

Mr. Cox. Did some internal discussion develop during that period of time with regard to the sufficiency of the case against Hall-Kimbrell with regard to the issue of asbestos and sheetrock and drywall?

Mr. WALKER. There were discussions of that aspect of the case throughout the past year. However, all along we have recognized that this is not a wallboard-only enforcement action.

Mr. Cox. I understand that, and I think that's very clear. Was there any discussion of whether or not to simply withdraw actual pursuance of the issue of drywall?

Mr. WALKER. Yes. That was discussed.

Mr. Cox. Do you know what it was that was the basis of——

Mr. WALKER. There were concerns that because wallboard is not identified by name in the Code of Federal Regulations that it might be difficult to prove a case involving allegations that a management plan was deficient because it did not contain wallboard.

In fact, I discussed with Ms. Letson at the time her concerns about that issue and pointed out to her that the Agency had not identified any of these asbestos-containing materials by name, specifically in the CFR. In the appendixes, certainly. The rationale for that was that we did not want to identify 80 or 90 types of asbestos or suspected asbestos-containing material and to leave out several others. But there was nothing—in hindsight, perhaps, it was a mistake, but it was not a fatal defect to the case. In many of our other regulatory programs, once a rule is in place, we find other examples where, through omission or error, things aren't included but should have been included by reference.

Mr. COX. There has never been any actual action to withdraw any portions of the complaint alleging the issue of drywall?

Mr. WALKER. Absolutely not. I might add that from our perspective, introducing evidence that companies have patented sheetrock and wallboard with asbestos in the United States for its fireproofing abilities is, in our opinion, good evidence.

Mr. COX. As I understand it, the next meeting with Hall-Kimbrell and PSI was on March 25 and 26 in Denver; is that right?

Mr. WALKER. That's correct.

Mr. COX. Are you aware of what was discussed during that meeting?

Mr. WALKER. Many of the same issues that had been discussed at the Chicago meeting were raised again. Hall-Kimbrell's concerns were, what exactly do you want us to do to fix these management plans, how are they going to be paid for?

Mr. COX. Then there was another meeting on May 30, 1991, with the same general discussion, and no resolution was issued at that point?

Mr. WALKER. That's correct.

Mr. COX. Thank you, Mr. Chairman.

Mr. SYNAR. Thank you, Mr. Cox. Ms. Fisher and panel, we still have a number of questions we need to ask. If you will let us go vote, I will ask the staff to try to cut these down to probably no more than 30 more minutes, if we could. So we'll be recessed for 5 minutes.

[Recess taken.]

Mr. SYNAR. The subcommittee will come back to order. Ms. Fisher, did EPA issue a subpoena to Hall-Kimbrell and PSI subsequent to the May 30, 1991, negotiating meeting?

Ms. FISHER. Could you repeat the question, Congressman?

Mr. SYNAR. Did you all issue a subpoena to Hall-Kimbrell and PSI subsequent to the May 30, 1991, meeting? If you did, why?

Mr. WALKER. Yes, absolutely. We issued a subpoena on June 27, 1991, requesting a complete list of the schools and LEA's listed by State for which Hall-Kimbrell conducted inspections, including triennial reinspections on where they prepared management plans.

Mr. SYNAR. Did they comply with the subpoena?

Mr. WALKER. They partially complied. They did, after some time, give us a list of schools. We then broke it into 10 pieces and sent it out to the regional offices asking them to check it against information that they knew was accurate. The reports we got back were that it was not an accurate list.

Mr. SYNAR. I understand the EPA issued a second subpoena to Hall-Kimbrell in early September of this year. What did that subpoena require?

Mr. WALKER. That subpoena required that they make available to the Agency copies of management plans that they had prepared and that they represented were in a warehouse in Lawrence, KS, so that we could look at them, compare them against our list, and evaluate them for completeness.

Mr. SYNAR. Did Hall-Kimbrell and PSI comply with that subpoena?

Mr. WALKER. They did not.

Mr. SYNAR. Would it surprise you if I showed you a stack here that we got of an entire listing of all the schools throughout this country? Why do we have it when you don't?

Mr. WALKER. That's all the schools or all Hall-Kimbrell schools?

Mr. SYNAR. That's just Hall-Kimbrell schools right there.

Ms. FISHER. Congressman, maybe they're being more cooperative with the subcommittee than they are with us.

Mr. SYNAR. Ms. Fisher, what steps have been taken with respect to enforcement of the second subpoena? What other steps do you plan to take against the company?

Mr. WALKER. At this point in time we have met with the Department of Justice, which is the prelude to enforcing the subpoena in Federal district court. TSCA subpoenas are not self-enforcing and therefore have to be enforced on a show cause order in U.S. district court.

Mr. SYNAR. Now, because they have not fully complied with the subpoena, what action did you all take on August 21 or 22 with respect to the LEA's?

Mr. WALKER. We mailed a notice to local education agencies and individual school operations identifying that Hall-Kimbrell management plans may have deficiencies, and suggesting that they take action within the next few weeks to evaluate the management plans prior to the children coming back to school.

Mr. SYNAR. Is it your practice to notify relevant LEA's whenever you initiate an AHERA enforcement case against alleged deficiencies in an inspection management plan?

Mr. WALKER. In some of our regions we do that, Mr. Chairman. For example, our region VII office, when they file a case against a contractor that has prepared a management plan, they will simultaneously issue a notice to the school district identifying for them the fact that an action has been taken and that they remain legally liable for a complete management plan.

Mr. SYNAR. But you don't do it for all cases?

Mr. WALKER. That's correct. It hasn't been our practice.

Mr. SYNAR. Why not? It appears that you only did it for Hall-Kimbrell or maybe a couple of others. Why not for all of them?

Ms. FISHER. Nationally, we have only done it for Hall-Kimbrell. Different regions have done it, and we are looking at whether we should be informing all of the LEA's when we begin to take an enforcement action against some of these companies. So I think it's a practice we may do more frequently in the future.

Mr. **Synar**. How did EPA state in its notice to the LEA's that Hall-Kimbrell plans were deficient?

Ms. **Fisher**. How did we state it? If you'll give me a second, I can read it to you. Basically, we say that "the U.S. EPA has reason to believe that your school's asbestos inspection and the resulting management plan that was prepared by Hall-Kimbrell, a division of Professional Services Industries, may be insufficient and therefore in violation of the Asbestos Hazard Emergency Response Act."

Then we go through the background of a little bit of what we've been doing with Hall-Kimbrell and say that "although negotiations are continuing between the parties, EPA is sending the notice to inform schools of potential deficiencies so that they might be corrected promptly or as part of the triennial reinspection under AHERA."

Mr. **Synar**. What did you recommend that the LEA's do if they determine their plans were deficient?

Ms. **Fisher**. The Agency recommended to schools that if their AHERA inspection or management plans were not in compliance with AHERA, they also may be liable for civil penalties for certain violations. We also recommended, as one option, that they talk to Hall-Kimbrell or PSI and see if they would conduct a new inspection and revise the plan for their particular school.

Mr. **Synar**. Were those notices to the 6,500 LEA's and schools informational in nature or formal notices of deficiency?

Mr. **Walker**. They were informational in nature. The difference would be if we had issued a notice of noncompliance, which we do under TSCA, that it would be sent certified mail, return receipt requested with the provision that they respond in writing within 30 days that violations——

Mr. **Synar**. They weren't under that requirement?

Ms. **Fisher**. No. They were not under a requirement to respond to us. These were sent to all of the schools, to our knowledge, that had Hall-Kimbrell do work for them. They were not necessarily the schools that we knew for a fact had problematic inspections on management plans.

Mr. **Synar**. Up until now we focused on Hall-Kimbrell, which is obviously the largest asbestos consultant involved in AHERA. If they had to compete with other firms throughout the country, have you determined what other major national, regional, or intrastate asbestos contractors perform their inspections and prepare their management plans in the same manner as Hall-Kimbrell or any other way that would make them deficient?

Ms. **Fisher**. We have other cases against other companies. Is your question have we compared Hall-Kimbrell's, the quality of their plans against the quality of other plans?

Mr. **Synar**. Well, we just want to know if their inspections were similar to Hall-Kimbrell?

Ms. **Fisher**. We have cases against a number of companies for some of the same type actions, failure to identify a variety of asbestos-containing materials, problems with the quality of their management plans, they didn't properly locate the material, they didn't give proper response actions.

Mr. **Synar**. What we're trying to do here, we want to know if the major national/regional firms, whether or not you've checked to see if their inspections were similar to the ones that you have found deficient with Hall-Kimbrell? Have you done that?

Ms. **Fisher**. We have checked the plans of a number of firms. I don't know that we have compared them against Hall-Kimbrell. I think we have compared them against our own requirements.

Mr. **Synar**. Name the five largest firms that are affected?

Ms. **Fisher**. Congressman, I can give you a list of about 15 or 20 companies that do business in a number of different regions. I don't know if I can tell you today what are the largest or what their volume of business is.

Mr. **Synar**. If you would provide that. Let me ask you this, are the largest competitors Law Engineering, BCM, Hygenetic, Caselon, and DiAngelo?

Ms. **Fisher**. Those would be some of their competitors.

Mr. **Kling**. Yes, I would say that. Because a lot of these firms do public and commercial buildings as well, sir, we're not sure which ones are the largest in the schools context.

Ms. **Fisher**. A company may be a large asbestos contractor. They may or may not participate to a large extent in the schools program.

[The information follows:]

Regional AHERA Contractor List

The following is a list of significant AHERA contractors located in these regions. These contractors perform region-wide, and in some cases, multi-regional or nationwide asbestos work:

Contractor Name	Region(s) where Located
Dennison Environmental, Inc.	I, IV
ATC, Inc.	I, IV
Northeast Analytical	II
Kaaflan & D'Angelo	II
Law Engineering, Inc.	IV, IX
Westinghouse Environmental &	IV
Geotechnical Services, Inc.	IV
Asbestos Abatement Associates, Inc.	IV
Southern Earth Sciences, Inc.	IV
Asbestos Abatement Associates, Inc.	IV
EG & G Engineering Sciences	IV
S & M Industrial Tech, Inc.	IV
Institute for Environmental Assessment	V
MacNeil Environmental, Inc.	V
Daniel J. Hartwig	V, IX
Vernon Travis	VI
Kiser, Inc.	VI
Maxim Engineers, Inc.	VI
Roth Asbestos Consultants, Inc.	VI, VII
Larron Laboratory	I, VII
RESTEC, Inc.	VII, X
HAZTOX	VIII, X
Hall-Kimbrell	nationwide
PSI	nationwide

Mr. **Synar**. Do you have a plan to gather this information or are you just going to do this on a piecemeal basis on individual firms?

Ms. **Fisher**. To gather what information?

Mr. **Synar**. Gather information of whether or not the inspections that were done by these major firms were similar to the ones by Hall-Kimbrell? Do you have a plan to review that or are you just going to look at them on an individual basis?

Ms. **Fisher**. Well, we'll pick a number of them up in the inspection schemes. Additionally, as we get information from States as to where they've had problems, that would provide us information.

Mr. **Synar**. So the answer to it is piecemeal?

Ms. **Fisher**. We don't have planned at this time to do a comparative among different contracting companies.

Mr. **Synar**. Why not?

Ms. **Fisher**. Because we are asking that they comply with our regulations not compare with each other. In other words, our enforcement efforts and our inspections will be to see whether or not they are meeting the requirements of AHERA, not to see whether they are doing better than or worse than another company.

Mr. **Synar**. As you know, Ms. Fisher, some of these schools relied on minor consulting firms as well as themselves. Do you have a plan to find out whether or not their work was performed efficiently?

Ms. **Fisher**. In terms of how we are performing our inspections, there will be a number of sources of information to us. Tips and complaints would be one, as Mike said earlier, talking with LEA's and States that have problems. We are not targeting the smaller firms, but they——

Mr. **Synar**. So you don't have a plan; do you?

Ms. **Fisher**. Well, we use a neutral inspection scheme which should bring up an array of different kinds of consulting firms.

Mr. **Synar**. Mr. Brandner, did Hall-Kimbrell conduct the inspections and prepare the management plans for Kansas City schools?

Mr. **Brandner**. To the best of my knowledge, they performed some of that work for the Kansas City, MO, school district but not for Kansas City, KS.

Mr. **Synar**. Just the Kansas City schools?

Mr. **Brandner**. Yes, Kansas City, MO, yes.

Mr. **Synar**. What was the result of those inspections?

Mr. **Brandner**. I don't think I'm knowledgeable about all of what might have gone on there, but I was asked for advice by representatives of the Kansas City, MO, school district. What they demonstrated to me was that Hall-Kimbrell had found asbestos-containing pipe insulation throughout all 72 schools within the district, had classified all of the pipe insulation as significantly damaged in all areas of every building in all 72 schools, leading the school district to seek advice elsewhere because they could not deal with trying to implement something that showed damage in every piece of pipe insulation throughout 72 buildings.

Mr. **Synar**. So it wasn't Kansas City's position that it was done poorly, they just wanted a different opinion that was less onerous; correct?

Mr. **Brandner**. I think what they were looking for was guidance on what do we do with this management plan that says we have severely damaged material throughout the entire facility.

Mr. **Synar**. Did they hire another firm to come in and rework this?

Mr. **Brandner**. They informed me that they have hired three additional firms to come in and redo the work.

Mr. **Synar**. On what basis did they hire these new firms? Was the job done poorly?

Mr. **Brandner**. I think they felt they had no way they could prioritize whatever asbestos abatement work needed to be done. So they had other firms come in to help them prioritize the materials.

Mr. **Synar**. Now, prior to EPA's filing of any of the Hall-Kimbrell enforcement cases, your region, region VII, filed a case on Roth Asbestos Co. regarding work performed in that region; isn't that correct?

Mr. **Brandner**. Yes.

Mr. **Synar**. Didn't the complaints against Roth Asbestos involve some of the deficiencies alleged in the subsequent Hall-Kimbrell complaint?

Mr. **Brandner**. Some of the same things, particularly the missing of certain materials, yes.

Mr. **Synar**. Have you concluded that enforcement case against Roth Asbestos?

Mr. **Brandner**. No, we have not.

Mr. **Synar**. Why not?

Mr. **Brandner**. At this particular point, we have engaged in prehearing exchange and are seeking a date before an administrative law judge.

Mr. **Synar**. Now the Roth Asbestos complaints involved about 300 schools in region VII which now allege to have deficient plans; is that correct?

Mr. **Brandner**. Yes.

Mr. **Synar**. Have you notified the schools involved in that case that you believe their plans are deficient, and that if left uncorrected EPA will take enforcement action against them?

Mr. **Brandner**. We have notified the seven schools districts which we inspected and where we found a deficient plan. The other schools have not been notified.

Mr. **Synar**. Why not?

Mr. **Brandner**. Because I think at this particular time we are still involved in negotiation, and we were hoping through the settlement process the company would return to those 300 school districts on their own.

Mr. **Synar**. So, let me see if I've got this correct. We have 1,300 LEA's affected by Hall-Kimbrell, at least 300 schools, or somewhere in that neighborhood, affected by Roth case, which is on hold pending resolution of the Hall-Kimbrell case. How many other enforcement cases are on hold pending this Hall-Kimbrell case, Mr. Stahl?

Mr. **Stahl**. I don't know that there are cases on hold because of Hall-Kimbrell, but within the civil action numbers that we've given you, there are a number of cases that are pending various kinds of action in the case development process. There are other cases that we may be developing and adding to the Hall-Kimbrell list.

Mr. **Synar**. Ms. Fisher, as we discussed about an hour ago, in addition to all this, we've now got plans for the two largest States, California and New York, where we don't know what the situation is because those States did virtually no review of the management plans; is that correct?

Ms. **Fisher**. I think New York actually did some review of their plans. California was a bigger problem.

Mr. **Synar**. But the point is, isn't it true that we really don't know how many management plans are out there that don't meet the asbestos requirements?

Ms. **Fisher**. I think that that is one of the flaws of the statute.

Mr. **Synar**. So that means that anybody who has done renovation or disturbance work involving unidentified suspect materials has needlessly exposed kids and workers to asbestos; doesn't it?

Ms. **Fisher**. Well, if they have done renovation or demolition, they are covered under the Clean Air Act, if they've done an action of a certain size. They should have both notified and complied with the requirements under that act. So there shouldn't be, except for smaller renovations, there should not be big problems that haven't been captured under the Clean Air Act.

Mr. **Synar**. Wasn't the point of AHERA to avoid these kind of risks?

Ms. **Fisher**. Clearly, the point of AHERA was to prevent unnecessary damaging of asbestos-containing material by identifying it and putting a management plan in place. I think it has accomplished that in many instances, but I think there's a whole lot of improvements that need to be made.

Mr. **Synar**. Does EPA actually know how many of the inspectors who conducted AHERA inspections did not include drywall and other materials cited in the Hall-Kimbrell cases in the original AHERA inspections? Do you all know?

Ms. **Fisher**. How many of the schools that were inspected——

Mr. **Synar**. How many of the inspectors who conducted it did not even include drywall?

Ms. **Fisher**. No, we don't.

Mr. **Synar**. EPA does not know how many of the thousands and thousands of management plans that have been prepared for LEA's across the country are deficient because the inspections upon which they are based did not include identification and sampling of significant amounts of asbestos-containing material; isn't that correct?

Ms. **Fisher**. Well, I think through the evaluation we have an idea of where schools have flaws. Now the evaluation did not deal with wallboard itself.

Mr. **Synar**. They didn't look at drywall; did they?

Ms. **Fisher**. The evaluation itself did not.

Mr. **Synar**. Well, it sounds like that this is a much bigger problem than you all are admitting to. What does EPA intend to do to try to get a good grasp of the scope of this problem?

Ms. **Fisher**. I guess I disagree with your characterization. I think there are certain flaws in the statute, particularly that nobody was required to review the management plans for quality. But I think that the Agency, through a tremendous amount of technical assistance and outreach to the schools, has been able to work with them so they can identify problems with and improve their plans.

So, although we have problems and there are areas for improvement, I don't think that there are significant risks to children in the school today posed by some of the shortcomings in this plan.

Mr. SYNAR. Do you know that, Ms. Fisher, because you really don't know what the inspectors looked for or not?

Ms. FISHER. Well, we do know, based on a lot of other work, that the levels of asbestos in most buildings are very low. So the risk of exposure to children in those buildings is also very low. We are concerned that some of these inspections, a large percentage of them, may have missed some materials and in other cases, several materials. That's an area that we want to work with the schools to improve.

Mr. SYNAR. One final question on reinspections. When the management plan is revised as a result of reinspection, does the LEA have to submit that revised plan to a State agency?

Ms. FISHER. No, they do not. Additionally, the Agency has no authority to enforce against schools who don't do a reinspection.

Mr. SYNAR. There was a substantial change made in the final AHERA evaluation with regard to why wallboard was excluded from evaluation. Could you explain what the change was and why it was made?

Ms. FISHER. About a year ago, stepping back from wallboard in the evaluation, it became clear to us that a number of people were not fully understanding the Agency's position on a number of asbestos issues, including whether the Agency required removals or not, including whether or not wallboard was or was not a part of the required inspections.

Because of that, we have gone to some extraordinary lengths to be sure that when the Agency issues documents, that they are clear to the public or to whatever the intended audience is. When we looked at the first couple drafts of the AHERA evaluation, we were concerned, given the fact that there was some controversy over wallboard, that we lay out clearly why we had not included it.

Mr. SYNAR. You do consider that a significant change?

Ms. FISHER. I don't consider it a significant change to the report because I think the way we had it originally drafted did encompass wallboard.

Mr. SYNAR. Why don't you explain to us what the change was that you don't find so significant?

Ms. FISHER. Well, let me read you the two. You have to give me a second. I read it last night, so I know it's in here. The first draft, or one of the earlier drafts, let me put it that way, laid out that there were three types of materials that were excluded from the evaluation. They included, and I'm quoting from the earlier draft, they included "those materials that never contained asbestos or so infrequently do that the large effort needed to assess them would provide little information to the study." That would be the group that we would consider wallboard to be in.

We changed it to be a little bit more clear and broke out the two categories that were referred to in that bullet. We broke the three categories into four, the one focusing on wallboard stated that "excluded materials were materials which are considered suspect under AHERA but infrequently contain asbestos and are present in such large quantities that a massive effort would be needed to assess them while providing little information to the study."

Then we gave some examples. Those examples are sheetrock and drywall which are sometimes called wallboard hard plaster walls.

Mr. Synar. Ms. Fisher, let me repeat the question. You don't consider that a significant change?

Ms. Fisher. I personally think it is not a significant change. I think it is clarification on a category that we already had in the earlier draft.

Mr. Synar. One more section here, if we could, Ms. Fisher. In your statement, you said that the Agency undertook its AHERA evaluation in order to "identify possible improvements in the school's program and to help determine the need for similar requirements in public and commercial buildings."

Would you first explain when and why you will be making a decision on that recommendation on an expanded program?

Ms. Fisher. The when is probably sometime that fall. The why is because we are engaged in a lawsuit under TSCA with several service employee unions requesting us to implement some kind of inspection program in public buildings.

Mr. Synar. Given the problems we've discussed today, do you still think AHERA is a model for these future programs?

Ms. Fisher. I think AHERA has performed a very positive contribution to the schools in order to both identify and manage their asbestos in those school programs. I think the fact that we undertook an evaluation, the fact that we have continued to provide updated technical assistance information to schools and to contractors, is a strengthening component of the program.

Mr. Synar. As you know, we've been talking about schools of which about 100,000 are included. When we take in commercial and private buildings, we're talking about possibly millions of those. Do you all have any cost estimates on the expansion of this program?

Ms. Fisher. We are working on those as we are evaluating whether we need to take action under TSCA. As you know, TSCA is a cost benefit statute and the Agency is required to look at the cost of implementing a program to address risks. So we are evaluating the cost of such a program.

I should point out that the fact that we would not necessarily have to develop a program for public schools that is as extensive as the AHERA program. You could do one that was less costly. You could do one that the timeframes were more relaxed.

One of the problems with AHERA, quite honestly, was the very stringent timeframes the Agency and the schools were under. If you were going to undertake public buildings, I'm not sure you would consider requiring them to do any kind of inspection in 12 months, as we did with the schools.

So there's a lot of things you could do if you looked at a public buildings program that would go to the cost and perhaps even the effectiveness of a program to control asbestos exposure.

Mr. Synar. Let's talk about that. We've spent a lot of today talking about wallboards. Are they in or out?

Ms. **Fisher**. We believe they are currently covered by AHERA.

Mr. **Synar**. Does that mean that your upcoming decision on part of public and commercial buildings will have to include a decision for that kind of inspection?

Ms. **Fisher**. It does not mean it does or does not have to be included. One of the types of inspections that we are looking at as we contemplate a public building program is whether we want a very limited, focused type of inspection that might be limited to as little as 5 materials or as many as perhaps 10.

There are a lot of different ways you could construct an inspection program that might be different from the schools program. It was the wording of the statute where it said "all asbestos containing material" that required the schools to undertake a very, very comprehensive inspection. We aren't faced with that situation in the public buildings program.

Mr. **Synar**. Now with respect to the risk factor, would it be the same with respect to whether it's included in the schools program or included in the public commercial buildings program?

Ms. **Fisher**. The risk factor of what?

Mr. **Synar**. The risk factor of health, exposure, wallboards?

Ms. **Fisher**. Those are two questions. Your exposure concerns and your risk concerns about exposure in the public buildings would probably be the same. Wallboard itself, from the Agency's perspective and from a number of advisors that we have had on this program, I don't think stacks up as one of the riskiest materials. That's because, as I said earlier, frequently wallboard may not even contain asbestos.

Mr. **Synar**. See, here's where I'm going, Ms. Fisher. If it's risky enough "to be in our schools," isn't it risky enough to be considered in our buildings? I mean, it can't be——

Ms. **Fisher**. Well, the statute that the Congress passed did not deal with risk. It talked about all asbestos-containing materials. So it didn't focus. In fact, our 1982 rule, which was in place prior to the passage of AHERA in 1986, focused on friable asbestos materials. Those are undoubtedly the more risky because they are crumbly, easily to release fibers into the air. The schools rule went beyond that, and I would suggest got away from whether or not a particular material may or may not cause significant risk in a school and focused on every single asbestos-containing material that contains asbestos above 1 percent.

So I think you could make a distinction between those materials that you might care the most about and an AHERA program where the requirements of the statute were that we include all materials.

Mr. **Synar**. We've had a few years experience with the schools program. Ms. Fisher, if we had to do it all over again, what would you do differently in light of what we know and in light of the mistakes we've made in the program?

Ms. **Fisher**. I would definitely give both the Agency and the school longer timeframes to come into compliance with AHERA. I think requiring us to draft the rule in 1 year, given the magnitude of the issues we were dealing with, was too strict.

I think we should have given the schools a longer period of time to comply in terms of doing their inspections which would have given both the Agency and the schools an opportunity to interact more and see what the strengths and weaknesses of the program were.

I probably would not set forth that the inspections had to include all asbestos-containing material. I would probably encourage that we all focus more on those that cause most risk. I think we would all make a lot stronger statement at the outset that people should be careful before they rip out asbestos-containing materials and only do it when the circumstances indicate that it is warranted; in other words, make it clearer.

I think there was some confusion with the schools early on whether or not the Agency wanted a massive wholesale removal. So I think I would make that a stronger part of the program.

Mr. **Synar**. What about enforcement?

Ms. **Fisher**. I think there are some enforcement amendments or additions that we would want if we had it to do over again. We probably would want subpoena authority or the ability to get access into some of the contractor's buildings. We've had a hard time getting information.

I think we would want more clarity under AHERA itself. It's very clear about LEA's being liable for certain actions. We've had to go back and use TSCA's title 1 to go after the contractors. I think we have adequate authority in that area, but it's one place, if you were going to start over again, you would probably strengthen.

Mr. **Synar**. Well, we don't have that luxury I just gave you of going back and doing it right the first time. In effect now, what do we do?

Ms. **Fisher**. Well, one of the things that we have dealt with as we have tried to make improvements to the program is the fact that, by and large, AHERA is implemented. The schools were required to do their inspections by certain dates. Those dates have passed. It's one of the things that we have had to deal with as we have thought through whether or not a strengthening rule would really be particularly helpful. In terms of clarity in the statute and clarity in the rule, what it will help us with is cases against people that are implementing response plans.

Mr. **Synar**. Well, we appreciate all of you being here. You've been very patient for 4½ hours here today. Let me just say this, Ms. Fisher, as you leave. Clearly, from the committee's questions today, we're very interested in this area.

We are concerned with respect to the scope of how serious this problem is. We're also very concerned about the impact this is going to have nationwide. As I left this room to go over to vote on that last vote, I happened to be on the van with my colleagues, and they were asking me what I was doing today. I mentioned this. It was amazing not one person on that van didn't say they had a problem, because all of them do.

It's clearly one of the major problems facing every individual congressional district in the country. When you are exposing 100,000 schools and literally millions of children to the potential problem, those schools, and the States, and the children, and their families are turning to us to give them the type of confidence that the place where their children are going to school is safe.

We have to do a better job at giving them that confidence. We look forward to your recommendations on what we can do now that this law is in effect. That said, the next great fear is if we can't run this program correctly when we're dealing with the most vulnerable of our society, our children, how can we expect to do a better job when it comes to commercial and private buildings?

So your comments, your suggestions on this will be very important as we proceed to the next level. We do appreciate all of you all being here today.

Our next witness is Mr. David Kimbrell who is the founder and former president of Hall-Kimbrell Environmental Services, Inc. Mr. Kimbrell, I swore you in during the executive session. I'll swear you again, if I could. Do you have any concerns about being sworn in?

Mr. **Kimbrell**. No, I do not.

[Witness sworn.]

Mr. **Synar**. I might mention for those who are present, we also offered PSI the opportunity to testify today. They did not take us up on that and provide a witness. However, there is a statement by PSI on the table over there for your consideration.

Mr. Kimbrell, your statement is very extensive. As you know, we've been here 4 or 5 hours. I think it's self-explanatory. What I'd ask you to do here, if you could, is to summarize here in about 5 minutes things that you've heard here this morning and other things.

STATEMENT OF W. DAVID KIMBRELL, FOUNDER AND FORMER PRESIDENT, HALL-KIMBRELL ENVIRONMENTAL SERVICES, INC., ACCOMPANIED BY DENNIS J. DOBBELS, ATTORNEY, POLSINELLI, WHITE, VARDEMAN & SHALTON

Mr. **Kimbrell**. Thank you. I was ready to give a chronology of the history of Hall-Kimbrell and how this, what I'll characterize as a fiasco, really occurred. But after hearing representatives from the EPA telling what I consider to be absolutely false statements to this committee, I don't really know where to begin in my 5-minute summation.

We all know that the bottom line to this whole controversy, at least as it relates to Hall-Kimbrell, is sheetrock. The EPA and Hall-Kimbrell and most national, highly-experienced asbestos consultants know that sheetrock is not an asbestos-containing material. It never has been an asbestos-containing material. It has never been treated so in practice in the industry prior to AHERA nor since.

If the EPA, as they so state at the last minute tried to describe as always having considered this material a suspect material, why then, in all of the EPA guidance documents issued since 1970 until the present, is there no mention whatsoever of sheetrock?

If this is such a killer material, if they were so clear in this, why in literally scores of official guidance documents, there is no mention of the word sheetrock anywhere except one place? Gentlemen, you know where the one place is? They recommend that you enclose asbestos-containing materials with what: sheetrock. That's like taking gasoline to douse a fire. The EPA knows good and well that this material does not contain asbestos, as per their definition, on a frequent basis.

Hall-Kimbrell did grow over the 1980's to be the largest asbestos consultant. We primarily grew not so much in other areas of abatement activities but in building inspections. By the time AHERA began, we conducted inspections of over 2 billion square feet of buildings, in general. We have conducted studies of over 15 entire State government-owned buildings across the United States. We have conducted numerous seminars prior to AHERA in how to inspect buildings.

Many of the seminars attended by the EPA, the same EPA persons that sat here in these chairs a little while ago. Mr. McNally and several others, such as Mr. Brandner, spoke at Hall-Kimbrell seminars on a regular basis. EPA even sent some of their people to get trained at Hall-Kimbrell seminars prior to AHERA.

When AHERA came along, Hall-Kimbrell, as was our practice, developed a comprehensive program to deal with our school clients, not only in the building inspections but in the other 28 items that were prescribed by AHERA for the schools to be done in a 1-year timeframe.

Those were, in addition to the inspections, training of personnel, posting of warning labels on the materials, et cetera. We applied to the Environmental Protection Agency to be, I believe the word is approved, an EPA-certified or an EPA-approved training entity.

After reviewing our materials and after auditing our classes, we were the first company in the United States approved by the Environmental Protection Agency to train and certify asbestos inspectors, as well as the other four AHERA-related courses.

I asked Mr. Brandner to teach our first class or to give part of the instruction to our first class for one reason: Because the rule was very ambiguous. It was very vague. There was no guidance document, gentlemen, put out at the promulgation of AHERA. There was nothing other than a bunch of vague rules that said, in one instance, that the inspector should use his or her best judgment.

We had a lot of questions. We didn't know what they meant by functional space. We did not know about which materials they wanted included, which ones they did not want included because there was no list put out at the time that they were asking us to send hundreds of inspectors out into the field to get this work done.

It was not until 7 months later—now the EPA likes to skirt over this issue and cloud the issue. It was 7 months into a 12-month process that the EPA held a teleconference with some school administrators; a teleconference where a transcript was issued, and for the first time, at least the first time I, in my professional career, had ever heard of anyone considering common gypsum sheetrock to be a common asbestos suspect material, there was an answer to a question on what's now referred to as the "100 Questions" that did indicate that they wanted common gypsum sheet- ck panels to be inspected.

v the way, the consulting community, was not even sent a copy 100 Questions. The consulting community was the communi- was out there, the engineering community that went out

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there trying in a very rushed, rapid, hurry-up manner to get these schools inspected.

Yet, the EPA did not even send the so-called guidance document to the consultants. They sent it to the schools. It was 2 months later before I personally had even heard of this 100 Questions. At that time, we had conducted two-thirds of all of our inspections.

We did not understand the so-called 100 Questions, to be an official guidance document. It was only after a couple more months when one State rejected our management plans, the State of Michigan, for not sampling common sheetrock materials, that we understood that this document was being considered as "the Bible" in some of the States.

At that time, we had a meeting, or some of our representatives from Hall-Kimbrell had a meeting with the State of Michigan. There were some other problems in the State of Michigan for we had a team of inspectors that did less than adequate work in general building inspections.

The central issue was this issue of wallboard. The State of Michigan, Mr. DeLeafde of the department of health in the State of Michigan, was using the so-called 100 Questions as a checklist for the completeness of management plans.

We told Mr. DeLeafde that we would write to the EPA to get some guidance on this issue because in the 100 Question document, if you will look at the very first page, it says "if you need further clarification about the answers in here, please contact the Environmental Protection Agency." It even gave a phone number, and I believe it said to write.

That's exactly what I did. I was the president of that company and thought that before the issue got out of control and other States started rejecting management plans for this that this ought to be brought to, at the time, Mr. McNally's attention, who I assumed was still head of the asbestos group.

I asked Mr. McNally to tell us if the EPA wanted the sheetrock material sampled. We're out in the field now. We can get the samples taken. Furthermore, I asked Mr. McNally if he would instruct all the States to at least have a consistent view on how these management plans should be reviewed in relation to the wallboard issue.

I did not receive a response. I called Mr. McNally's office and I believe a couple of other offices, Mr. Kling's office—I can't remember exactly who else—on probably five or six occasions from January through, I believe, June 1989. I never had my phone calls returned.

In the meantime, here we are, the company—they knew that we had thousands or hundreds of school districts out there under their rule. They would not take 10 minutes to pick up the phone and respond to my requests. Do you want the sheetrock sampled or do you not?

It would have cost Hall-Kimbrell no additional money to assume the sheetrock walls to be asbestos if that's what they wanted, but we simply did not assume sheetrock to be suspect because it was not——

Mr. SYNAR. Mr. Kimbrell, let me interrupt you. You've b going for about 8 minutes. Maybe it would be better if we

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pinpoint some of this. Would it be all right if we started some questions and tried to walk you through some of the things that have been said?

Mr. Kimbrell. Yes, sir. I have a hard time staying on the 5 minutes, I know.

[The prepared statement of Mr. Kimbrell follows:]

W. DAVID KIMBRELL
TESTIMONY BEFORE
CONGRESSIONAL SUBCOMMITTEE
WEEK OF SEPTEMBER 23, 1991 (WASHINGTON, D.C.)
EPA INTERPRETATION OF AHERA

Good morning/afternoon Congressmen. My name is David Kimbrell, and I live in Lawrence, Kansas. I have been invited here today to provide testimony on the United States Environmental Protection Agency's (EPA) implementation and interpretation of the Asbestos Hazard Emergency Response Act (AHERA). Specifically, I will address how the EPA's interpretation - or, more aptly, lack of interpretation and inconsistent interpretation - of that Act has affected schools and consultants, including Hall-Kimbrell Environmental Services, Inc., an environmental consulting firm. I was Hall-Kimbrell's founder and President during the implementation of the AHERA program. Hall-Kimbrell was sold to a company call Professional Services Industries, Inc. on January 1, 1990.

I would like first to identify what I think are the central questions this subcommittee must address in understanding the EPA's conduct with regard to the AHERA program by providing an abbreviated history of AHERA's implementation.

Congress passed AHERA in 1986. The Act required public and private schools nationwide, from kindergarten through 12th grade, to comply with a long list of items, including to conduct inspections to identify asbestos containing materials and afterward to develop a written plan to manage those materials. The EPA issued regulations in April, 1987, which became final in October, 1987. The actual school inspections, conducted by consultants like Hall-Kimbrell, took place between December, 1987 and April, 1989. So, we are talking about 15-18 months for the nation's few consultants to inspect every school in the country--some 17,000 school districts with over 1/2 million schools.

In March, 1990, one year after all inspections had been completed, the EPA filed an administrative action against Hall-Kimbrell in Region VIII (Colorado) seeking to impose fines of up to $25,000 per day (per violation) against Hall-Kimbrell, totalling over 6 million to date, primarily for Hall-Kimbrell's alleged failure to consider, during their inspections, common sheetrock and hard plaster wall systems as suspected of containing asbestos. Since then, the EPA has issued several more administrative fines against Hall-Kimbrell in various regions, including an administrative action in Region VII (Kansas City, KS) for Hall-Kimbrell's alleged failure to consider common sheetrock and hard plaster wall systems as suspected of containing asbestos.

The issues then, and which I will address in detail in my testimony, are:

1. Is gypsum wallboard, commonly known as sheetrock (and also referred to as drywall), and are hard plaster walls, "suspect" asbestos containing materials?

2. Did the AHERA regulations or lawfully passed "guidance documents" clearly identify sheetrock/drywall as "suspect" asbestos containing building materials?

3. What was the practice in the industry during the school inspections and how did the EPA clarify, if at all, what the practice should be with regard to sheetrock/drywall?

4. Has the EPA acted fairly and properly under its own rules in its attempted assessment of fines related to the sheetrock/drywall issue? Or, stated another way, was the EPA's enforcement conduct arbitrary and capricious in attempting to fine companies for failure to consider sheetrock wall systems a "suspect" ACBM, and an abuse of its powers against selected consultants?

I respectfully submit to the subcommittee that the EPA is now attempting, two years after the inspections were completed, to take a position inconsistent with the available scientific evidence and inconsistent with its own position on the sheetrock and hard plaster issue over the last several years. In fact, its stated position that sheetrock and hard plaster wall systems should be considered "suspect" is contrary to its published Final Report evaluating AHERA, issued in June, 1991 by the EPA to Congress. Sheetrock and drywall are not asbestos containing building materials (ACBM's) within the meaning of the AHERA regulations, and in the last two decades they have not been treated in the industry as ACBM's.

Furthermore, if it intended for those materials to be identified and treated as suspected asbestos containing materials, the EPA never said so, much less said so clearly, even after Hall-Kimbrell wrote to them, called them, and met with them for guidance on the issue. At best, the EPA provided vague and contradictory information on how sheetrock and hard plaster wall systems should be treated, all at a time when both schools and their consultants were attempting to comply in a very short period of time with very complicated, vague and inconsistent regulations.

I. Pre-AHERA Asbestos Regulation and the Development of Hall-Kimbrell as an Environmental Consultant in Asbestos

The question of whether a certain type of wallboard--sheetrock/drywall--should have been considered a suspected asbestos containing material cannot be understood apart from the broader framework within which the AHERA regulations developed, and in light of industry practices as those regulations emerged.

Federal regulation of asbestos emerged in 1972, when the Occupational Safety and Health Administration promulgated regulations to control exposure to asbestos and to protect human health. In 1973, under the National Emissions Standards for Hazardous Air Pollutants (NESHAPS), the EPA promulgated rules to control exposure to asbestos during building renovation and demolition. In 1976, with the passage of the Toxic Substance Control Act (TSCA), and under Title I of that Act, three asbestos regulations were passed over a period of several years. One of the regulations included the 1982 Asbestos in Schools Act, which required schools to inspect for friable materials, required sampling and analysis to determine if materials contained asbestos, and required notification of the findings to all interested parties (*e.g.*, school service workers, teachers, and parents). Congress followed, in 1984, with the Asbestos School Hazard Abatement Act (ASHAA), which authorized $600,000,000 in grants and loans to school authorities over a six year paid for abatement of hazardous conditions involving asbestos.

Congress passed AHERA in 1986, as an amendment to TSCA, which provided for the establishment of federal regulations requiring inspections for asbestos containing materials and implementation of response actions with respect to those materials in the nation's schools. Had the EPA administered the 1982 Asbestos in School Act properly in the first place, Congress would never have had the need to pass AHERA, and force the nation to spend additional millions in taxpayer's money.

Prior to AHERA's passage, the approach to identifying and abating asbestos hazards in schools, as well as in other public and commercial buildings, was marked by the industry's creation of state-of-the-art procedures based upon hands-on experience. There were few, if any, rules written in stone. People, including EPA staff and administrators, developed protocols through experience and the exercise of informed professional judgment.

Prior to the passage of AHERA in 1986, Hall-Kimbrell, which was started in 1982 well prior to AHERA, had developed sophisticated, comprehensive studies of very large building systems, including buildings inspected for some 15 to 20 entire state-government-owned properties. Hall-Kimbrell had become the largest asbestos consultant in the nation, and had conducted more property inspections for asbestos than any other firm in the United States. By the time Hall-Kimbrell began inspections in response to the AHERA rule, the Company had inspected almost 2 billion square feet of building space in over 220,000 buildings nationwide and overseas. With very little guidance from the EPA during the early 80's, companies like Hall-Kimbrell did a remarkable job conducting their own research and developing very detailed engineering and scientific protocol that are currently, by _de facto_, the standards in the industry for addressing various toxics in building properties.

II. AHERA Passage and Requirements

The requirements AHERA imposed on schools in 1986 were broad and complex in scope, and ambitious in terms of deadlines. In short, the schools were to conduct inspections (which occurred primarily through professional consultants, such as Hall-Kimbrell) to identify asbestos containing building materials (ACBM's) and to recommend response actions, including abatement procedures. Schools were required to submit management plans, through the states, to the EPA by October 12, 1988, only one year after the regulations themselves became final. The plans were to be implemented by July 9, 1989. The management plan submission date and implementation dates were later extended for certain schools, with final management plans due in May, 1989.

Hall-Kimbrell contracted with 7-10% of the nation's schools (under AHERA referred to as Local Educational Agencies - LEAs), representing approximately 38,000 school buildings throughout 47 states. Hall-Kimbrell developed a comprehensive program entitled the AHERA Compliance Program, which included far more than inspections of schools. The program went on to include employee training and assistance with notifications and warning labels. A copy of Hall-Kimbrell's entire AHERA Compliance Program, marketing and sales materials, and a description of the program, was provided to the EPA, Region VII, for review. Hall-Kimbrell received no comment from

Region VII about its Program. More specifically, Hall-Kimbrell was not told it should consider sheetrock and hard plaster wall systems as "suspect" ACBM.

Under its Model Accreditation Program, the AHERA regulations required that consultants to the schools receive EPA-approved professional training in up to five different courses (worker; contractor/supervisor; abatement project designer; inspector; management planner). In October, 1987, Hall-Kimbrell received accreditation from the EPA for training asbestos inspectors nationwide. Hall-Kimbrell was the first organization to receive full approval to conduct all five courses. The contents of Hall-Kimbrell's inspector training course were provided to the EPA and reviewed by the EPA, which determined that the inspector training course, and the other courses, met or exceeded the requirements for the proper and professional training of inspectors.

Furthermore, after Hall-Kimbrell's written material passed the EPA's scrutiny, Region VII EPA administrators audited the first courses to approve the verbal course content. In these course materials, and during the actual training courses, Hall-Kimbrell never instructed its inspectors to generally consider common gypsum wall systems or hard wall plaster as "suspect" material, and the EPA never told Hall-Kimbrell to do so.

- **The Wallboard Issue**

After the EPA's approval of Hall-Kimbrell's course materials and training programs, Hall-Kimbrell set out in late 1987, and throughout 1988 and the early part of 1989, to assist schools in complying with the AHERA requirements. This, of course, included inspecting schools for ACBM's.

There are two aspects to the wallboard issue:

1. What do people mean when they use the term "wallboard"?

2. Should sheetrock/drywall, which is a particular type of wallboard, be considered a "suspect" asbestos containing building material?

Perhaps the single most confusing element of the wallboard issue is the use of the term "wallboard" itself. The word has been used indiscriminately by manufacturers, writers, agencies and the EPA. It is not always clear exactly what is meant by a particular use of the term, but the range of meaning is clear: wallboard can mean gypsum board (sheetrock/drywall), "transite"-type cementitious board, insulating boards and millboards. There are distinctions between types of wallboard, the most critical of which is that some wallboard contains asbestos (e.g., transite or cement asbestos wallboard) and some does not (e.g., sheetrock). Of these products, one does not often hear gypsum board called wallboard by those in the construction industry. It is most frequently called drywall, sheetrock, or gypsum board.

In an EPA guidance document referred to as the "Purple Book," for example, which the EPA relies on in arguing that common sheetrock/drywall is a suspected asbestos containing material, the EPA includes a list of asbestos containing materials in buildings. The list itself does not mention wallboard of any type. However, in several places in the text the word "wallboard" is mentioned (e.g., 4th paragraph at page S-1; twice on page 1-1; 2.2.4, page 2-8). Consideration of the use of the word wallboard in this context, however, discloses that the reference is to "transite"-type-cementitious wallboard and other hard insulation boards, since the text states that it is "hard and non-friable, and sampling would damage it." Sampling gypsum wallboard does not damage it to any greater extent than any other materials, whereas it is very difficult to repair sampling of transite.

The Purple Book itself provides one of the most contradictory pieces of information the EPA has provided on the wallboard issue. Rather than affirmatively stating anywhere in the Purple Book that sheetrock is a dangerous asbestos containing material, the EPA recommends that asbestos materials be encased with sheetrock. This advice, taken to its logical extreme (if the EPA really believes sheetrock is so dangerous), is like recommending dousing a fire with gasoline.

As another example of the differences in types of wallboard, the EPA itself clearly has distinguished between asbestos containing wallboard and wallboard that does not contain asbestos. In early 1988, and although Hall-Kimbrell already had received the EPA's full accreditation for training, Hall-Kimbrell invited Mr. Wolfgang Bradner, the EPA's asbestos coordinator for Region VII, to teach a portion of the first inspector class under the new AHERA rule. Hall-Kimbrell wanted to make certain that all its inspectors (at that time over 100) had a clear understanding of the EPA's instructions as to which materials to address as "suspect" and which materials not to address as suspect.

Mr. Bradner accepted Hall-Kimbrell's invitation to conduct the training class and to answer questions posed by the inspectors. Hall-Kimbrell videotaped Mr. Bradner's presentation. [I have already made available to the subcommittee the videotape of the entire presentation, an edited version addressing the wallboard issue, and a transcript of the videotape.]

During his 2½ hour long presentation, Mr. Bradner consistently referred to "asbestos cement wallboard" as material inspectors would have to identify as suspect asbestos containing material--e.g., "Miscellaneous asbestos containing materials is [sic] what we describe as interior building materials on structural components, structural members or fixtures such as floor and ceiling tiles. This is something we did not inspect in the past. It also includes your asbestos cement wallboard, for example."

Asbestos cement wallboard, also referred to as transite board, is a suspect asbestos containing material and was identified by Hall Kimbrell in its school inspections under AHERA when encountered. Sheetrock and drywall, however, were not identified, and should not have been, as pointed out by Mr. Bradner during the training session:

> "I think this is a very important concept to this business about suspect material containing asbestos or not. For example, that wall right there [pointing to common sheetrock] you would not suspect of containing asbestos. . . . we are looking for things that would commonly be suspected of containing asbestos in schools." [Emphasis added.]

Mr. Bradner himself acknowledged that, "you see with these rules, it's not all cut and dried and there is some room for variation." Commenting on the AHERA regulations and how inspections should be conducted, Mr. Bradner emphasized that the inspectors should draw on their experience and judgment:

> "The inspections have to be performed by accredited people and it is a visual and a tactile inspection of all school buildings. This is not an inspection where you set up air monitoring devices and let them run for eight hours and decide I've got a hazard or I don't have a hazard. This is based on your experience of where to look and touching the material to find out if its friable or not. You've got to identify the locations of friable and non-friable suspected asbestos continuing building materials." [Emphasis added.]

In its battle over the wallboard issue with the EPA, Hall-Kimbrell told the EPA about Mr. Bradner's instructions during the videotaped training session. In an August 15, 1991 letter to me, the EPA denies "unequivocally" that Mr. Bradner ever indicated that sheetrock is not suspect ACBM. [See Kling letter to Kimbrell, attached as Exhibit A.] Even in the face of its own unambiguous statements, and as throughout this entire conflagration, the EPA has disclosed the Orwellian tendency to transform facts to suit its own purposes, and to disregard circumstances as they actually existed during AHERA's implementation.

- **Scientific Evidence Supporting that Sheetrock, Drywall and Hard Plaster should NOT be considered suspect**

Even assuming, for the sake of argument, that references to wallboard in the Purple Book were intended to include sheetrock and drywall, there is no scientific evidence to support that common gypsum wallboard (sheetrock/drywall) is an asbestos containing material. The components of gypsum walls that might possibly contain asbestos are the gypsum board itself and the joint compound. Gypsum board has been produced in quantity since the 1930's and has been in widespread use since the end of World War II. According to the Gypsum Association, approximately 556 billion square feet of gypsum board were produced and distributed domestically from 1937 through 1988.

Members of the Gypsum Association were surveyed by Hall-Kimbrell, and, according to those companies, none has ever used asbestos in their gypsum board. Two technical managers with Gypsum Association member companies recalled that, for a brief period in the 1940's or 50's, some small amount of gypsum board containing asbestos was produced "experimentally." One of these managers said this production was very brief, one or two production runs, because they quickly discovered that asbestos absorbed water and thus was unsuitable for use.

Hall-Kimbrell also contacted Underwriters Laboratory. A staff member with 29 years experience at UL said he had never encountered evidence of asbestos containing gypsum wallboard. UL could not release Kimbrell records concerning products tested due to trade secrets and confidentially requirements.

Even in the face of this evidence, I agree that some products manufactured in sheets did contain asbestos, e.g., asbestos cement boards. However, we do not agree that all wallboard must, therefore, be considered suspect. It is not difficult to differentiate between gypsum board and cement board. In fact, gypsum wall board is perhaps one of the easiest of all construction materials to identify. Usually, it can be identified visually; it can always be identified by touching and sounding it.

Although there is good reason to doubt that gypsum board itself should be considered a suspect ACBM, it is well known that joint compound frequently contained asbestos until that practice was banned in 1978. The amount of asbestos in joint compound varies. Hall-Kimbrell's labs have found asbestos contents ranging from 3% to 10%. Gypsum walls, consisting of gypsum board, nails, tape and joint compound, are constructed to create a single uniform and uninterrupted surface. Thus, gypsum walls can only be considered a "system." As systems, gypsum walls do not meet the regulatory definition under AHERA for asbestos containing material, which is greater than 1% asbestos by weight.

The Gypsum Association itself contacted the EPA in January and June, 1989 seeking guidance on whether the EPA considered common sheetrock and drywall an ACBM. In his June, 1989, letter to the EPA, Mr. Walker of the Gypsum Association asked the EPA to identify any "scientific evidence" or "otherwise" that common sheetrock is an ACBM. In an internal EPA memo dated February 22, 1990 (and updated on May 29, 1990), which I obtained through a Freedom of Information Act request, an EPA staffer says "the data I was able to collect was generally otherwise, rather than scientific, unfortunately."

The EPA has had numerous opportunities to instruct consultants, builders and owners that sheetrock and hard plaster were deemed suspect ACM, if that was the EPA's true intention. However, in no EPA-issued official guidance document has there been any mention, either in text or in a list of suspect materials, that common sheetrock and hard plaster are suspect.

For example, in one of the EPA's pre-AHERA documents entitled Asbestos in the Home, the EPA goes to great length to identify asbestos containing materials. Although sheetrock is probably the largest single material used in homes, it is not listed in the book. Similarly, in a post-AHERA document, The

ABC's of Asbestos in Schools, the EPA lists numerous suspect asbestos containing materials. Sheetrock is not included. The question is this: If the EPA truly considers sheetrock to be a killer material, why have they never listed it in any official guidance document? The EPA would not and has not put sheetrock, drywall and hard plaster on a list of suspect ACM's because they are not suspect ACM's, and the EPA knows it.

In short, Hall-Kimbrell did not regard common gypsum wallboard (sheetrock/drywall) as an ACBM at any time during its tenure as an asbestos consultant, including when it was conducting inspections on behalf of schools under AHERA. Most other experienced consultants did not either. Gypsum wall systems and hard plaster just simply have never been considered suspect ACM's.

• The "100 Questions" Teleconference and Resulting Confusion as to Wallboard Issue

With the EPA's imprimatur on Hall-Kimbrell's training materials, and with the additional information and guidance provided in person by the EPA's Mr. Bradner, Hall-Kimbrell inspectors (trained in a three week rather than the required three days training program) began in 1987 a nine-month stint to conduct inspections. The EPA did not issue a formal guidance document to assist newly-trained inspectors to complete their task under AHERA. Therefore, the inspectors used their best judgment as instructed by Mr. Bradner and the EPA, and used knowledge as supplied in Hall-Kimbrell's training program that had been approved and audited by the EPA.

In May, 1988, 19 months after AHERA became law, and seven months after the regulations were published in final form (October, 1987), and just five months before the completion deadline, the EPA released to schools a document now commonly referred to as the "100 Questions." In this document, the EPA answered questions raised under the AHERA regulations and about which there was apparent confusion. In one of its answers, the EPA noted that "non-friable suspect ACBM could be wallboard." Additionally, as part of the answer to question 38, a table identifies some wallboard as an ACBM covered by the AHERA regulation. This document, sent out months after the inspections had actually begun, ultimately created confusion in the industry about how inspections were being conducted at the schools.

Now the EPA contends that this "100 Questions" document is somehow an official guidance document. In its legislation instructing the EPA to promulgate the AHERA rule, Congress was explicit as to what constitutes rulemaking. The "100 Questions" document simply does not meet these requirements. Furthermore, the document was not published at the time of the AHERA regulations, but after the fact.

Consultants do not have crystal balls, and the U.S. Constitution has ex post facto laws to protect the innocent from being found guilty for violating laws that were passed after an alleged offense occurs. The "100 Questions" document was not even provided to the consulting community, but was provided to the school districts themselves. In fact, it was two months after the teleconference that Hall-Kimbrell even heard of the document, having received a copy from one of its school clients.

But, even assuming the "100 Questions" document had been given to Hall-Kimbrell, the EPA made clear in its May, 1988 letter enclosing the "100 Questions" that answers to questions could change and that, when uncertain, a district or consultant should contact the EPA for guidance:

> "School officials and others, however, must understand that in some instances, their specific situation may vary from the situations posed by the questions. If conditions or circumstances . . . do differ, even marginally, the answers could also change. If you are uncertain about a particular response . . . you should contact the EPA." [Emphasis added.]

Hall-Kimbrell did exactly what the EPA advised. In early 1989, after three state agencies rejected Hall-Kimbrell management plans because of the apparent inconsistency between the "100 Question" approach to wallboard and Hall-Kimbrell's approach to wallboard (as previously confirmed by the EPA's own Region VII Asbestos Coordinator), I then wrote a letter to the EPA asking for guidance on the issue.

In my January 30, 1989 letter to Robert McNally of the EPA, I asked Mr. McNally to "publish a formal statement on [wallboard] so that the process of assessing materials may be standardized." [*See* January 30 Letter Kimbrell-McNally, Exhibit B.] I did not hide that Hall-Kimbrell inspected buildings a certain way, but, on the contrary, I *volunteered* that Hall-Kimbrell *was not* considering wall systems other than transite as a suspected ACBM, as it had done in the past. If Mr. McNally and the EPA had told Hall-Kimbrell the EPA considered wall systems suspect and to address them on the inspections, *Hall-Kimbrell would have done so*, even though that requirement would have been contrary to the scientific evidence.

Instead, I received no response from Mr. McNally or the EPA. Having received no response, Hall-Kimbrell assumed its inspection protocol was correct, and continued inspecting schools in the same manner. A reasonable person would think that, if the EPA considered sheetrock and hard plaster walls dangerous and a gross violation of the AHERA rule (to later warrant potentially millions in fines), Mr. McNally would have taken five or ten minutes to call or write Hall-Kimbrell. In the following months, and as Hall-Kimbrell attempted to complete its school inspections and provide final management plans by the deadline date, Hall-Kimbrell continued to contact the EPA by phone, with no response.

In August, 1989, I wrote again to the EPA asking them for guidance because of the tremendous amount of chaos and confusion about the wallboard issue. [See August, 1989 Kimbrell Letter to EPA, Exhibit C.] Again I received no response. After many telephone calls in August to the EPA, the EPA consented to meeting with three Hall-Kimbrell representatives in Washington, D.C. on October 3, 1989. At that meeting, EPA officials Gina Bushong and Steve Young acknowledged that the regulations were ambiguous and asked Hall-Kimbrell to provide whatever information it could to further clarify the issue.

Hall-Kimbrell had submitted an "issue paper" along with the evidence we had to support Hall-Kimbrell's position. At no time did the two EPA officials state that sheetrock or hard plaster wall systems should be considered "suspect" ACBM. After the meeting, and after appearing to agree with Hall-Kimbrell, the EPA informed Hall-Kimbrell representatives that they would, in fact, get a policy statement out on the issue shortly.

After the October meeting, Hall-Kimbrell called Mr. Young's office approximately every two weeks and received the same response--that the EPA's official statement would be issued shortly. Notwithstanding the immense consequences to the school inspection program nationally, the EPA still did not respond to Hall-Kimbrell. No response was issued then, or at all in 1989, or ever by the EPA, at least not until well after consultants in schools could not do anything about it.

Although the EPA did not issue a policy statement on the wallboard issue, and contrary to stories the EPA has relayed to various Congresspersons inquiring about the October 3 meeting, I have learned recently that the EPA contacted an official in Michigan shortly after the meeting. The State of Michigan, which had rejected Hall-Kimbrell's management plan, was told by the EPA, after its meeting with Hall-Kimbrell, that it had changed its mind on the wallboard issue, and was inclined to agree with Hall-Kimbrell's position.

III. The EPA's present position

In March, 1990, nearly three years after the AHERA regulations became final, and nearly twelve months after Hall-Kimbrell's inspectors were back from the field, the EPA filed an administrative action against Hall-Kimbrell in Region VIII (Colorado) seeking to impose fines, primarily because Hall-Kimbrell had failed to identify common sheetrock or drywall as a "suspect" asbestos containing material in its school inspections. The filing of this action was the first response Hall-Kimbrell received from the EPA about the issue.

When I wrote to the EPA throughout 1989, when I called the EPA, when Hall-Kimbrell representatives met with the EPA, I felt it our duty to obtain guidance for Hall-Kimbrell inspectors as well as to obtain official, unbiased and standardized guidance for all the 50 state interpreters of the AHERA rule.

With persistence and in good faith, Hall-Kimbrell attempted to resolve the wallboard issue, and with numbing consistency the EPA failed to respond. If this bureaucratic nightmare were not enough, the EPA sent out a press release along with its Region VIII administrative action filing that identified Hall-Kimbrell as having violated AHERA--a press release that suggested Hall-Kimbrell was guilty before ever given the chance to defend. Then, when I attempted to intervene in the EPA's action against my former company, Hall-Kimbrell, so I could raise in a neutral forum the very issues I am raising here today, the EPA threatened to hold me personally liable for the fines unless I withdrew the intervention motion. The EPA appeared to me to be after everything but the truth, and by marshalling its vast enforcement powers against me and Hall-Kimbrell, by threatening me, the EPA has created harm and has abused the very power it had been given to right wrongs.

Finally, just in the last month, the EPA has sent letters to all schools that used Hall-Kimbrell during the AHERA inspections, advising them that their management plans are not in compliance, and suggesting that the schools may have to pursue their legal remedies against Hall-Kimbrell. ALL OF THIS BEFORE a judge OR jury or any neutral party has even determined that Hall-Kimbrell did anything wrong.

I do not expect this subcommittee to believe that Hall-Kimbrell did not make mistakes. We did--with 38,000 school buildings inspected in 12-18 months time, there are errors. No doubt most consultants made mistakes, especially when judged by EPA standards and interpretations developed after the fact. Due to the subjective nature of AHERA and the "science" of school inspections, there is no such thing as a "perfect" survey. But we provided all schools with a well-defined and well-implemented service. When we discovered problems, Hall-Kimbrell went back to the schools to address them.

But the wallboard issue, which is the central basis upon which the EPA has attempted to fine Hall-Kimbrell, is different: Hall-Kimbrell asked for the EPA's help but the EPA sat silent. The EPA does not have the prerogative to hide its opinions and refuse to issue guidance to those who are seeking guidance, and then punitively fine those companies for failing to guess what the EPA's position is.

And what the EPA's position is, even now, is astonishingly ambiguous. In its Final Report on AHERA, published in June, 1991, the EPA concedes that "sheetrock" and "drywall" infrequently contain asbestos. Final Report at p. 2-3. The EPA acknowledges that sheetrock, drywall and hard plaster walls cannot be considered suspect ACBM's, because, by its own definition of "suspect" material, "suspect materials are suspected of containing asbestos because, before 1980, they were frequently manufactured using asbestos." Final Report at p. 3-1. [Emphasis added.]

Moreover, the EPA sent inspectors into the field to reinspect school districts to determine whether all suspect ACBM's had been properly identified by the original inspections. When reinspecting the schools, the inspectors used forms excluding "hard plaster wall," sheetrock drywall and "sheetrock" from reinspection. A copy of the AHERA forms are attached to the EPA's Final Report.

The EPA earlier had contended that an inspector could not tell the difference between transite and sheetrock, drywall or hard plaster walls on inspection. Based on this assumption, the EPA speciously argued that sheetrock, drywall or hard plaster walls should be considered a suspect ACBM. Now, the EPA acknowledges that an inspector can tell the difference and has explicitly excluded sheetrock, drywall and hard plaster walls in its reinspection of schools for evaluation of AHERA compliance. Yet, the EPA has and continues to levy outrageous, punitive fines against Hall-Kimbrell for failure to address the very materials the EPA does not address in its own inspection statements.

IV. Conclusion

The EPA was organized to do what the name implies: To protect the environment, to promulgate regulations, and to enforce those regulations that protect people and the environment from those who accidentally or purposely cause harm. Rather than protecting the environment, however, it appears that the EPA has begun a campaign to go after the very companies that are there to assist the EPA in its challenge. The companies that form the environmental consulting industry have done a remarkable job in light of very weak and, often times, very vague regulations promulgated by the EPA. Yet, the EPA targets its enforcement powers against those companies, and not against the polluters of the environment.

Hall-Kimbrell had nothing to lose by identifying common sheetrock and drywall as a suspect asbestos containing material. If it had been instructed to do so, Hall-Kimbrell would have identified the materials at an appropriate charge to its clients.

I recognize the importance of the AHERA program and school inspections, which ultimately work to make the school environment safe. If what the EPA really intends is to make schools safe, then common sense would require, at a minimum, that notices be sent to all school districts (not just those 7-10% who used Hall-Kimbrell) that their plans might not be in compliance, and that inspection issues could be addressed at the triennial inspections required under AHERA. This way, LEAs (the schools) will not have to incur additional costs, since reinspection is required anyway.

If the EPA determines that sheetrock, drywall and hard plaster are suspect asbestos containing materials, the economic impact in this country will be staggering, and will go beyond the AHERA requirements in schools, to affect industry nationally. Sheetrock and drywall are one of the most common materials in buildings -- commercial, residential, and public. To force the EPA's after-the-fact interpretation of AHERA rules into the public domain generally, will force everyone in this country to take "clean up" action into the next century.

Nevertheless, if drywall and sheetrock are to be considered ACBM's to make schools safe, then the EPA and Congress must determine it to be so clearly. But I do not believe the EPA is really concerned about making schools safe, and the EPA cannot have thought through the economic impact of requiring schools -- and, ultimately, commercial and residential owners -- to sample sheetrock/drywall or assume it to be suspect.

I do not believe that the EPA truly cares about administering a set of rules in a fair, unbiased manner for its stated intention: to protect school children from exposure to asbestos. The EPA has used its mighty power in an arbitrary and capricious manner against, in this case, a large company that had helped forge the building inspections standards for the EPA's own monetary gain.

Having notified the EPA in January, 1989 that Hall-Kimbrell was inspecting 38,000 schools across the country in a certain manner, the EPA's purposeful non-response to my request for guidance allowed the EPA later to go on a massive treasure hunt by imposing the maximum fines allowed by law: Fines which go directly to the EPA - not to a fund for school abatement programs.

The EPA's general attitude in enforcement under AHERA is "zero tolerance," and outrageous in the context of AHERA. To fine companies the maximum amount for minor violations of rules and regulations that themselves were unclear is like sentencing to death the parking violator -- and it makes one wonder what the punishment would be for murder. In his videotaped training presentation to Hall-Kimbrell, Wolfgang Bradner, discussing fines, said:

> "If I could show that they willfully . . . violated the law, that was $13,000 plus the possibility of jail. In the last five years, we have not issued a single $13,000 penalty . . . It was all mistakes and not being clear about what the rules require."

Now, the EPA insists on maximum fines for minor infractions, which is completely contrary to Bradner's statement.

Hall-Kimbrell and the EPA and the schools should never have become adversaries. And this did not have to be a legal or administrative war. But the EPA has not moved forward fairly, and has not represented to the public circumstances as they actually existed during the school inspections.

I ask this subcommittee to provide the guidance and direction to the schools, to consultants, that has been lacking from the EPA itself, and use its legislative power to stop the EPA in its treasure hunt for Hall-Kimbrell and other consultants.

Thank you.

V:\1899

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 1 5 1991

OFFICE OF
PESTICIDES AND TOXIC
SUBSTANCES

W. David Kimbrell, Chief Executive Officer
Scanning America
PO Box 1597
2706 Iowa Street
Lawrence, KS 66044

Dear Mr. Kimbrell:

This is in response to the July 11, 1991 letter you sent to Senator John H. Chafee regarding an enforcement action taken against Hall-Kimbrell Environmental Services, Inc. by the Environmental Protection Agency (EPA).

As stated in your letter, you sold your company, Hall-Kimbrell Environmental Services, Inc., to Professional Service Industries, Inc. (PSI) in December, 1989. Subsequently, EPA filed an Administrative Complaint against the Hall-Kimbrell Company which detailed inadequate preparation and implementation of management plans for a large number of schools in Region VIII under the 1987 regulations of the Asbestos Hazard Emergency Response Act (AHERA).

The administrative enforcement actions against Hall-Kimbrell have at all times been conducted by EPA in accordance with the regulations at 40 CFR Part 22.

PSI is currently discussing with EPA a possible settlement of the Complaint against Hall-Kimbrell. Although the citations against Hall-Kimbrell identify a number of asbestos-containing building materials (ACBM) that were missed in the school inspections they conducted, such as ceiling and floor tiles and plaster walls, your letter refers only to the type of wallboard commonly referred to as sheetrock or drywall.

In your letter you state that "EPA's contention that sheetrock must be inspected and tested under the AHERA regulations are arbitrary, capricious and utterly ridiculous" and in support of this statement, you make the following charges:

> "Mr. Wolfgang Brandner, the Regional Asbestos Coordinator in Region VII, indicated in an audit of Hall-Kimbrell's training course, that sheetrock need not be considered an asbestos-containing material subject to inspection."

EXHIBIT A

BEST COPY AVAILABLE

"EPA has never in any of its regulations promulgated under AHERA required that sheetrock be examined as a suspect material."

"Representatives of Hall-Kimbrell met with the EPA representatives in Washington, D.C. and were told that the EPA was embarrassed by the issue, indicated it was not a problem and that the EPA would get back to Hall-Kimbrell."

Several other allegations were made but our responses to those listed above should address all of the charges you made in your letter to Senator Chafee.

Mr. Brandner has stated unequivocally that he has never indicated, either implicitly or explicitly, that sheetrock is not considered suspect ACBM.

EPA has issued explicit policy guidance that gypsum wallboard (a generic term for sheetrock) is a suspect material under AHERA. See page 33 of the enclosed EPA document 100 Commonly Asked Questions About the New Asbestos-in-Schools Rule.

In a letter to Robert McNally, Chief of the Assistance Programs Development Branch dated July 10, 1991, you state ". . . certain states were rejecting management plans due to the May 1988 EPA teleconference where one bureaucrat indicated that sheetrock should be considered an ACM and the material should have been included on the inspection. At that time, I assumed the EPA had simply made a mistake in the 100 Questions Teleconference."

You give no reason why you assumed that the statement by the EPA representative was a mistake. It was, in fact, an accurate and unambiguous statement of EPA's policy regarding sheetrock. In addition to the 100 Questions document, Appendix 3 to Subpart E of the AHERA regulations clearly indicates that drywall is a suspect material.

Your characterization of the statements made by EPA staff in a Washington meeting with Hall-Kimbrell representatives is also at variance with the recollections of EPA personnel who were at the meeting. EPA staff members did not indicate "it was not a problem" but did suggest that Hall-Kimbrell provide any evidence they had to support their view that sheetrock should not be considered suspect ACBM.

EPA considers sheetrock to be a suspect building material for two reasons. Walls constructed of sheetrock panels are joined with tape and joint compound, which frequently have relatively high percentages of asbestos. This means that damage to walls may release asbestos fibers even if the wallboard itself was not manufactured with asbestos. In addition, there is data that indicates that sheetrock was manufactured with asbestos by certain manufacturers. EPA, therefore, was obligated under AHERA to include gypsum wallboard as a suspect material.

Also, it should be emphasized that nonfriable suspect materials such as wallboard can simply be assumed to be asbestos-containing building material which obviates the necessity for testing. Therefore, your assertion that "EPA's contention that sheetrock must be inspected and tested under the AHERA regulations" is incorrect. AHERA regulations allow the material to be identified and assumed to be ACBM without taking samples for analysis. The citation against Hall-Kimbrell was failure to identify wallboard not failure to sample wallboard.

EPA feels that wallboard (including gypsum wallboard) was properly and clearly identified as a suspect material at an early stage of the implementation of the AHERA regulations. While your concern is understandable in view of the pending litigation, your assertions are simply erroneous.

Sincerely,
RJ McNally for
David J. Kling, Acting Director
Environmental Assistance Division

Enclosure

cc: Michael J. Walker

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Hall-Kimbrell

W. David Kimbrell
President

1066

January 30, 1989

Mr. Robert McNally
Chief of Regulatory and Technical Assistance Section
Hazard Abatement Assistance Branch
USEPA
401 M St. SW
Room 545 - East Tower
TS-794
Washington, D.C. 20460

Dear Mr. McNally:

Over the past 10 months Hall-Kimbrell has been working with a large number of school clients throughout the nation to assist in satisfying the requirements of the AHERA Regulations. These regulations have caused several issues to surface in the asbestos forum that may have a severe impact on the industry as a whole.

A major issue that has caused the most concern recently regards certain types of wall materials that may exist in a school, specifically sheetrock and hard plaster. Many states are making last minute interpretations of the AHERA law regarding how these materials must be addressed in a management plan. These interpretations vary from totally ignoring the issue to requiring ridiculous standards to be met for identification and quantification of these materials.

Hall-Kimbrell is the single largest most experienced asbestos services consulting firm in the nation. We have encountered and sampled the vast majority of building products that are likely to contain asbestos over the past six years. This history of sampling has included wallboards and plasters; our findings indicate that the likelihood of either of these materials to contain asbestos is extremely low. If these low incident positive materials are to always be considered as suspect materials during a general assessment then why not also consider such materials as paint, glues and mastics. We have to draw the line somewhere; the cost to building owners to quantify and locate these materials would be astronomical.

During our six year history, Hall-Kimbrell has inspected more than 2 billion square feet in 245,000 buildings for asbestos containing materials under general inspection conditions. Invariably these assessments did not address sheetrock and hardwall plasters (Our demolition/renovation assessments do cover these materials-at a much higher fee). If, as a result of the influence the AHERA Regulations are having on the asbestos industry, it is suddenly decided that these materials should have been addressed then the general assessments performed by Hall-Kimbrell and other consultants must be considered incomplete. To be forced to redo these inspections would result in an incredible cost burden on our past and present clients.

Another consideration is even more potentially devastating to the economy. If sheetrock and hardwall plasters are considered to be suspect ACM then virtually every home owner in the nation would be forced to deal with the issue. I have seen the impact that the asbestos issue has at the commercial real estate level; I cannot fathom the impact it would have at the home owner level.

The issue, of course, has a considerable impact upon the future costs of operating a school maintenance department. If these wall materials have to be considered to be asbestos containing then maintenance staff would not even be able to hang a picture without following O & M guidelines for ctivities with the potential to produce an exposure ondition. The cost of this restriction is of inconceivable roportions.

feel that, if these materials must be assessed, then it is rudent to assume that they contain asbestos and treat them ccordingly. This is because of the difficulty in assessing hese materials. We don't believe that these materials can e adequately addressed by any current general assessment rotocols for the following reasons:

- Virtually all materials are entirely covered by surface materials and coatings such as paint.
- Plaster of the sort used to fill cracks, joints, etc. were invariably mixed on site during application. This results in little, if any, consistency in percentage content of asbestos in the material.

- Many surface coats are textured so as to reduce reflections from incandescent lighting and sunlight. This texture makes it extremely difficult to determine where the plaster may be located.

Quantities of ACM plaster in a building are very difficult to estimate because of the reasons mentioned above and the variations in applications by different tradesmen. For example, one tradesman may trowel a 6 inch wide patch along a wall seam while another may use a 3 inch wide patch. Even with all other estimating variables constant this could result in a 100% variation.

It is not unlikely that the 3-5-7 sampling criteria for surfacing materials may breakdown when used on these types of plasters. A simple example will illustrate this:

> Consider a 100,000 ft^2 building consisting of exactly 7 equal size rooms. In a building of this size there would likely be in excess of 10,000 ft^2 of wall plaster and therefore 7 samples would be collected. Random collection may result in the collection of one sample per room. If the results are positive then the AHERA regulations require that the entire plaster area be considered as positive; the same result as when all are positive.
>
> The problem arises when all samples are negative. First reaction is to say that all plasters in the group are negative. However, because of the previously mentioned reasons for difficulty in quantifying this type of material, we as professional consultants would state that this result, while perhaps satisfying legal requirements, should not be taken as conclusive evidence that all wall plasters are free of asbestos.

The safest way to deal with wall plasters if they must be addressed is to roughly estimate the expected amount of plaster and report it as potential ACM. Since the material is sealed and non-friable, a response action of Operation & Maintenance/Monitor would be applied. This would allow us to deal with the situation over time under the O & M Program. It is important that a statement be made regarding future renovations involving these assumed ACM wall materials. Prior to any renovation, a detailed evaluation should be undertaken to verify the existence of asbestos in the materials. At that time, if the material in this smaller area is determined to be free of asbestos then note of this should be made in the management Plan (and to the State) and the renovation may proceed without using special asbestos removal and handling procedures. However, including sheetrock and hard gypsum wall plaster in a "general survey" is utterly ridiculous and overkill, so that the average survey cost to the owner would probably increase by some 2 1/2 to 3 fold. If this is to be included, there are not enough laboratories and field technicians to begin to double the load.

The AHERA regulations, being somewhat sound in intent, have caused a considerable amount of chaos in the school environment in this county. Unrealistic time constraints and economic burdens accompanied by some very creative interpretations and actions on the part of the individual state agencies have made the whole issue appear to be rather nonsensical to many of the school districts consultants, and other building owners.

It is in all of our best interests to resolve situations such as this wallboard and plaster issue. For this reason we respectfully request that your agency review the issue and publish a formal statement on it so that the process of assessing the materials may be standardized. However, I would like to stress that if these materials are determined to be suspect under current legislation, few school districts will likely be able to bear the burden of cost that the reassessment of these materials would impose upon them.

The process of production of management plans is reaching a critical phase and I hope that you can make a statement on this issue quickly. I would be happy to discuss the issue with you further; you can call me at any time at 1-800-445-0682.

Sincerely,

HALL-KIMBRELL ENVIRONMENTAL SERVICES, INC.

W. David Kimbrell
President

WDK/paw

Hall-Kimbrell

W. David Kimbrell
President

August 18, 1989

Robert McNally
Chief of Regulatory and Technical
  Assistance Section
Hazard Abatement Assistance Branch
USEPA
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Washington, D.C. 20460

Dear Mr. McNally:

I wrote to you on January 30, 1989 (copy of letter attached) regarding the amount of chaos and confusion surrounding the various interpretations by individual state agencies reviewing management plans and within the EPA districts themselves.

I know you are very busy, but I have not yet received a response to the letter. However, the issue has become of critical and paramount importance that I am writing you again in hopes to set up a meeting in Washington very soon to address these issues.

You are probably aware that since writing that letter, AHERA compliance and interpretation of its provisions has become an absolute chaotic nightmare across this country. It has become a nightmare for the U.S. schools as well as for the consulting community hired by the schools to bring them into compliance with the regulations. Hall-Kimbrell, being the largest asbestos consultant and, therefore, representing a major portion of the schools is being pulled, twisted, and shoved in every direction in interpretation of AHERA regulations. There are literally fifty (50) different interpretations of regulations and what is required for acceptance of management plans in those states. In addition there are ten (10) different EPA regions which are interpreting the regulations in drastically different ways. What is more frightening, though, depending on which inspector in a particular region visits your school for review, you have no idea which interpretation he/she might use.

The whole issue of wallboard, sheetrock, and the like is being interpreted in ten different ways across the country. The issue of functional space is also being interpreted in various ways. We, as consultants and representatives to our clients, cannot operate with unclear, undefined, and inconsistent regulations. We do not have crystal balls. We do not know which inspector will visit the school and what he/she does or does not care about. If we and our schools are to comply with the regulation, its interpretation must be consistent and clear.

I am not writing on Hall-Kimbrell's behalf only; I am writing on behalf of some 45,000 LEA's and thousands of consultants in this country who are being equally pulled in every direction to appease individual EPA inspectors and fifty different state interpretations of what should and should not be in a management plan. We need to get some clear interpretation to the issue of what is left to the inspector's discretion; the "wallboard" issue; functional space issue; and the like. We have to nip this in the bud now because the economic impact the chaos is having on the country's schools is too tremendous to ignore.

I would like to set up a meeting in Washington with you, representatives of Hall-Kimbrell and possibly some of our clients in the near future. Would you please let me know your availability for an appointment so we can once and for all get clear interpretations and directives from you at EPA headquarters so this controversy may be straightened out.

I look forward to hearing from you.

Sincerely,

HALL-KIMBRELL ENVIRONMENTAL SERVICES, INC.

W. David Kimbrell
President

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Mr. **Synar**. Let's try to do it that way. As I mentioned before, the subcommittee is not trying to judge the legal merits of EPA's complaints or your defense or PSI's. We're trying to find out what's going on and where things stand with the program. So let me see if I can ask you some basic questions here, and then we'll give you an opportunity at the end to say anything else you want.

How many States do you all operate in and how many inspections did your former firm perform?

Mr. **Kimbrell**. Excuse me, Mr. Chairman, for the schools under AHERA?

Mr. **Synar**. Yes.

Mr. **Kimbrell**. If memory serves me correctly, my former company inspected about 1,300 LEA's, which represented somewhere in the neighborhood of 30,000 to 40,000 buildings in, I believe, 47 States.

Mr. **Synar**. How many people have you trained?

Mr. **Kimbrell**. Excuse me?

Mr. **Synar**. How many people have you trained?

Mr. **Kimbrell**. For that? I would estimate there were probably 200 to 250 inspectors working on that program.

Mr. **Synar**. From other programs, I'm sorry, from other companies. How many people have you trained from other companies?

Mr. **Kimbrell**. Oh, my goodness. I would say in the neighborhood of tens of thousands, not just for AHERA but for all sorts of other courses and other programs.

Mr. **Synar**. Just for AHERA.

Mr. **Kimbrell**. Just for AHERA? I would estimate a couple of thousand.

Mr. **Synar**. Now the percentage of the number of plans that you all did was 10 percent of the Nation's schools; is that correct?

Mr. **Kimbrell**. Well, it's kind of hard to tell. It's somewhere between about 5 and 10 percent. It just depends on how you look at it.

Mr. **Synar**. You heard me earlier mention the largest competitors. They were Law Engineering, BCM, Hygenetic, Kaselon, and DiAngelo; is that correct?

Mr. **Kimbrell**. Yes, sir, it is.

Mr. **Synar**. Now, let me get into some specifics here. Mr. Brandner, in his under oath testimony, said that your training materials listed wallboard as potentially suspect material. Do you agree with that statement from Mr. Brandner?

Mr. **Kimbrell**. No, I do not. I can tell you what he is referring to, if you would like me to.

Mr. **Synar**. Excuse me, I didn't hear you.

Mr. **Kimbrell**. I can tell you what he is referring to, if you'd like me to.

Mr. **Synar**. What is he referring to?

Mr. **Kimbrell**. He's referring to somewhere very, very deep in one of the manuals that I reviewed after all this became an issue, there is a reference to—if I remember correctly, there's a reference to an issue called demolition surveys. In asbestos inspection lingo, you refer to surveys as general surveys and demolition surveys.

Sometimes a client may request, because they might have a manufacturers record of an extensive amount of joint cement or something being used, that they would want certain walls being tested, although they are not commonly considered suspect. However, generally, whenever we in our training classes ever referred to common drywall or gypsum, we are referring to many times the materials need to be what we call cored, not sampled but cored, because in between the walls many times in common sheetrock walls, especially in older buildings prior to about 1969 or 1970, is blown in crysotile asbestos mats, especially on exterior, low-bearing walls.

So, if you're performing a demolition survey, a lot of times you're going to want to take a plug out and use a little wire tool to go in and see if the interior insulation, upon demolition, would be crysotile asbestos as opposed to fiberglass.

Mr. **Synar**. So you're saying that none of your training materials said that drywalls were asbestos prone?

Mr. **Kimbrell**. I'm saying that on our training materials, I can't remember exactly the words, how it goes, we have never, never instructed our inspectors, schools or otherwise, to treat common gypsum sheetrock panels as a common asbestos suspect material.

Mr. **Synar**. Now, EPA testified under oath, too, that you did not want a response to your letter to them; is that correct?

Mr. **Kimbrell**. That's an absolute falsehood. I have no idea what Ms. Fisher was talking about. Why did I try over and over and over and over to get a response to just keep getting ignored?

Mr. **Synar**. In January 1989, when you first wrote to EPA about wallboard, were your inspections still going on?

Mr. **Kimbrell**. In January 1989? Yes, sir. We had, in fact, all of our inspectors, just about all, still out in the field.

Mr. **Synar**. What about in October 1989 when you met with EPA, were inspections still going on?

Mr. **Kimbrell**. No, sir. The deadline had already completed, which was May. We had, I might add, while all the inspectors were still in the field in January 1989, we simply asked, "Do you want these materials included or not?" While they were out in the field, all they had to do is go either pull the sample or issue a statement or form into the management plan that assumed the walls contain it. Without guidance, we don't have a crystal ball.

Mr. **Synar**. Let's talk about the guidance EPA gave you. What kind of guidance did they give you?

Mr. **Kimbrell**. Mr. Chairman, the only guidance Hall-Kimbrell received from the EPA was in the regulation itself, and I'm sure you're familiar with the regulation. There's nowhere in that regulation that lists which materials they would like addressed on these inspections. They leave it up to experience and the inspector's judgment.

Second, we received guidance from Mr. Brandner at the EPA. We asked Mr. Brandner to teach our first AHERA class. At that time it was 100 inspectors. We asked him because there were those types of issues that were totally cloudy and gray that we didn't understand.

We have provided a videotape of that, of course, to this committee. You have to slow it down to see. But it was clear to all of us from his instructions that when they are referring to wallboard—wallboard, by the way, which is a generic category, unlike what the EPA is trying to make this committee believe, wallboard is a generic category like bird. There are a lot of kind of birds—parrot, robin, et cetera. We were trying to get some clarifications on this wallboard.

Mr. **Synar**. Let's talk about that. That 100 Questions document we talked about, which was issued in May 1988, tried to clear up misunderstandings on that program. By that time, had many of your inspections been completed?

Mr. **Kimbrell**. Yes. I would say half or more.

Mr. **Synar**. Half of those.

Mr. **Kimbrell**. Of the inspection portion of our whole program.

Mr. **Synar**. Inspections. When did your company receive a copy of the 100 Questions?

Mr. **Kimbrell**. We received a copy—if memory serves me correctly, we received it from one of our school clients about 6 to 8 weeks——

Mr. **Synar**. So you didn't get it from EPA. You got it from an LEA?

Mr. **Kimbrell**. No, sir. We got it from one of our LEA's. The EPA did not send it to us.

Mr. **Synar**. Did you ask for additional guidance from EPA on how to conduct your work after reading that 100 Questions?

Mr. **Kimbrell**. I personally did not. I don't know if any other members in our company—any of the vice presidents or not. I will be honest. I remember a meeting when I heard about this 100 Questions. I called a meeting. We honestly did not consider a transcript of a teleconference to some school administrators, especially at the end of the teleconference it says that these answers are not placed in stone; that many circumstances will change depending on the situation.

We honestly did not believe that it was an official EPA guidance document. We honestly thought that it was just simply a mistake. It was——

Mr. **Synar**. Then why did you ask EPA for clarification?

Mr. **Kimbrell**. Because a couple of months later is when the deadline for the first management plan was to be submitted came about. We received a rejection from the State of Michigan based primarily on not addressing common sheetrock materials in those schools buildings. At that point, I said to someone—I remember the statement. I said it looks like at least one of these States is taking this 100 Questions as the Bible. We need to get in touch with the EPA to see if we can get some clarification on this issue.

Mr. **Synar**. Let me see if I've got this correct. On January 30, 1989, you wrote a letter to Robert McNally of EPA asking for guidance on the status of wallboard under the program; is that correct?

Mr. **Kimbrell**. That is correct.

Mr. **Synar**. You asked for guidance regarding wallboard and told him that Hall-Kimbrell did not inspect wallboard?

Mr. **Kimbrell**. That is correct.

Mr. **Synar**. So that's an admission on your part that you didn't do that?

Mr. **Kimbrell**. I informed Mr. McNally. I volunteered. I wasn't hiding anything.

Mr. **Synar**. So what was their response to that?

Mr. **Kimbrell**. Absolutely nothing.

Mr. SYNAR. Would your inspectors have examined wallboard if they had been told to do so?

Mr. KIMBRELL. If the EPA had responded to my letter and said yes, we would like it to be considered to be a suspect material, yes, sir. Absolutely we would have. We just have to have guidance. We don't have a crystal ball.

Mr. SYNAR. Did you continue to contact EPA after you received no response?

Mr. KIMBRELL. Yes, sir. I contacted them by telephone on at least four or five occasions. I never had my phone call returned.

Mr. SYNAR. Did you have any warning that EPA would consider your plans inadequate?

Mr. KIMBRELL. Not at that time, no.

Mr. SYNAR. Now, didn't 100 Questions indicate that the plans were to include an examination of wallboards since it was a suspect material? I mean, wasn't it pretty clear by questions 35 and 85 that was indeed in there?

Mr. KIMBRELL. It was clear by question 35 that one respondent on the panel that put that teleconference together that he considered gypsum panels.

Mr. SYNAR. If you knew about that in May 1988, why did it take you until January 1989 to ask the question about wallboard?

Mr. KIMBRELL. Well, that is what I'm trying to answer here, what I said a few minutes ago. First of all, it was not an official guidance document. We did not—since it was never sent to the consultants—put yourself in our case. This was not sent to the consultants. It was sent to the school districts as a transcript of a teleconference to assist school administrators.

Had it the enforcement power and the authority behind it that they claimed so much now that it did, why wasn't it simply just sent to the consultants, the ones that were out doing this? We did not consider it to be a guidance document. We simply considered it to be a mistake on that one question because never in any of their other documents had they ever considered common sheetrock materials asbestos.

If I could just say this one last thing before the next question, if sheetrock materials, if the EPA considered these common sheetrock and hard plaster materials as commonly suspected of containing asbestos, these materials, gentlemen, represent more of the total quantity of building materials in schools and public buildings than any other material. It's in every residence in this United States. It is in almost every single building. Wouldn't you think somewhere they would have said it, that maybe this stuff is a suspect material? They've never done it. So we simply thought it was a mistake. I honestly did.

Mr. SYNAR. You do agree that some forms of wallboard, like transite, do contain asbestos; don't you?

Mr. KIMBRELL. Absolutely.

Mr. SYNAR. You knew that; didn't you?

Mr. KIMBRELL. Absolutely. In fact, if I could use that analogy again, this whole issue of the term wallboard, the EPA tries to make wallboard in their testimony today synonymous with the word sheetrock. There is nothing farther from the truth. That's like—wallboard is in the same category as car, and there are

Buicks, Chevrolets, and all sorts of, Mercedes, all sorts of other cars under that.

Wallboard is a generic category just like pipe covering is a generic category. There are numerous types of pipe covering, such as fiberglass, magnesium silicate, rubber. But the EPA certainly is not assuming or going around fining consultants for not sampling rubber and not sampling plastic PVC pipe.

Wallboard is in the same category. There are three or four primary categories of wallboard. One is transite materials, which absolutely almost always contain asbestos, and which Hall-Kimbrell always has, and I assume still does always, treat as suspect.

The other categories are sheetrock, masonite panels, and a few miscellaneous, those of which do not generally or hardly ever have contained asbestos.

Mr. **Synar**. But in all this confusion, Mr. Kimbrell, wouldn't it have been the wiser thing to just routinely inspect the walls while you were doing it if there was any doubt?

Mr. **Kimbrell**. Well, it was not until 2 months after the 100 Questions that were sent out that we even ever heard of wallboard ever being considered suspect. It's kind of like saying why didn't you just consider plastic suspect or the wood suspect? Because it never had been.

It was a full 2 months after these 100 Questions came out that the question had even arisen itself. By then, we were two-thirds of the way through these inspections.

Mr. **Synar**. Mr. Kimbrell, aren't you currently being sued by PSI, to which you sold your interest in Hall-Kimbrell?

Mr. **Kimbrell**. I'm being sued by them and I'm suing them. We're in a double lawsuit, I guess you would call it.

Mr. **Synar**. Now the basis of that suit is that you failed to disclose potential liabilities of your company for what EPA alleges are inadequate asbestos plans; correct?

Mr. **Kimbrell**. That's the foundation of the lawsuit; that's correct.

Mr. **Synar**. It is also true that if you could show that you had no way of knowing that your plans were inadequate, PSI's case against you would be greatly weakened?

Mr. **Kimbrell**. Excuse me, I couldn't quite hear you.

Mr. **Synar**. It is also true that if you could show that there was no way of knowing that your plans were inadequate, that PSI's case against you would be greatly weakened?

Mr. **Kimbrell**. I would assume so.

Mr. **Synar**. Mr. Kimbrell, let me give you a minute here to summarize anything else you'd like to present to the subcommittee's attention. We have concluded what questions we have.

Mr. **Kimbrell**. Well, there's so much, I don't really know where to summarize it. But I will just say I think it's an outrage what EPA has done to this company, to my former company. Hall-Kimbrell has been used as a whipping boy. It is very clear. They have used Hall-Kimbrell as an example.

We have heard from other consultants that the EPA tries to force other consultants to pay up fines that they levy against them, saying if you don't pay up and get to a settlement conference, we're going to do to you what we've done to Hall-Kimbrell.

They have inflamed school districts by sending out a letter to all these Hall-Kimbrell schools, not schools in general but just Hall-Kimbrell schools, schools they haven't even inspected, and recommended that these schools sue Hall-Kimbrell, by the way. Ms. Fisher conveniently did not tell you that about that letter.

The only thing I can say is the EPA has known all along that common sheetrock materials are not suspect. They have, after issuing these fines and after me notifying them in January 1989 that we were inspecting 38,000 schools in a certain way, not hiding it, Mr. Chairman, but telling them proactively this is how we're inspecting schools. Do you want us to change or not?

They lay and wait. They scurried. We know now from freedom of information requests, documents we've got, that they had no scientific information, evidence, to support that contention. They have been scurrying ever since to find some shred of evidence to support these outrageous allegations against this company.

There are hundreds of materials that contain asbestos in schools, more so than sheetrock does, and yet you don't see the EPA out fining people for cinderblock. Who would think that you should bore a hole in cinderblock? A lot of schools are made out of cinderblock.

Cinderblock is well known to contain crysotile asbestos in many cases. Are they fining people for paint? There's a lot higher probability that common textured paint on wall surfaces contains very high quantities of asbestos. Yet, I have never heard of anybody getting fined for paint.

Mr. SYNAR. Mr. Kimbrell, I think you want to kind of conclude here in the next 30 seconds.

Mr. KIMBRELL. I guess, finally, I have asked on numerous occasions for guidance from this agency that is supposed to be here to give us guidance. My last request for guidance—I have been asked by the R.S. Means Co. in Boston to write a definitive guide on asbestos inspections for publication by McMillen next year.

I am down now to writing that book, and I'm down to the sheetrock issue. I wrote to the director of the EPA and said, "I'm writing this book for R.S. Means, the construction publishing company." I said, "What do you want me to put in here about sheetrock?" In their typical fashion, they have not responded.

Mr. SYNAR. Thank you, Mr. Kimbrell. We appreciate your comments today.

Our final panelist today will be James August, health and safety specialist of the American Federation of State, County and Municipal Employees, AFL-CIO. He will be accompanied today by Diane B. Burke, legislative affairs specialist. Are you by yourself?

Mr. AUGUST. Yes.

Mr. SYNAR. Mr. August, let me ask you if you have any objection to being sworn in? If not, would you raise your right hand?

[Witness sworn.]

Mr. SYNAR. Your entire testimony will be made part of the record.

At this time, I would ask you to briefly summarize it quickly.

STATEMENT OF JAMES AUGUST, OCCUPATIONAL HEALTH AND SAFETY SPECIALIST, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

Mr. AUGUST. I'll try to ad lib a summary, in that case.

To begin with, my union represents tens of thousands of school employees across the country. They are the custodial and maintenance people who have the direct responsibility of responding to asbestos and protecting themselves and the school population, the children, the teachers, and whoever else.

The gist of my remarks were going to be that despite the implementation problems that you've been going over today, that this program conceptually and otherwise is very sound. In fact, two things have happened as a result of the AHERA program.

No. 1, it was proven in the evaluation that you can go out, target a group of buildings, a very large population of buildings, and you can, in fact, find most of the suspect material. Inspectors did very well at identifying suspect materials and assessing its condition.

The other part that's important about the evaluation is that it did not lead to wholesale removal of asbestos. The critics of AHERA and those that are trying to oppose extending this kind of program to public and commercial buildings have been, for years, putting out this myth that if you let people know it's there, they're going to panic. They are going to overreact and it's going to lead to wholesale removal of asbestos.

The schools program showed that in fact it only happened in 16 percent of the school buildings. We did not have panic. We did not have hysteria. There's no reason to think we'd have that kind of reaction in public and commercial buildings when we didn't have it—when the objective was to protect children.

The other thing I'm here mostly to speak to today in support of the program of AHERA, is to speak about it's implications in terms of public and commercial buildings. EPA estimated that there were roughly three-quarters of a million buildings that contained asbestos in this country in a report a few years ago.

In fact, those estimates are probably very conservative. A New York study that was done just a couple years ago in New York City, it was 68 percent of the buildings, and 20 percent of that material was considered to be in deteriorated condition.

There is currently a program going on—I mean, the OSHA asbestos standard is being revised, and that's relevant here because there are elaborate procedures that need to be followed when you're going to disturb asbestos. Unfortunately, there is no regulation in public and commercial buildings right now that requires that people take affirmative steps to identify asbestos so that they can then comply with other regulations that are on the books.

If people don't know that it's there, be it sheetrock which, quite frankly, in the scheme of things, is not the most serious material to be concerned with, surfacing material, fireproofing material, the pipe wrap, all of these materials have far higher likelihood of containing asbestos and in greater quantities.

If you don't know it's there, workers are not going to take precautions when they have to disturb the material. They're going to expose themselves and everybody else in the building. The very thing we have been trying to avoid in the schools continues day after day in public and commercial buildings because building owners and employers have not taken that first affirmative step of identifying materials.

If we allow that to happen or to continue, what we'll have is a situation which is the tragic result, and then we'll have continued death and disease in the tens of thousands, by the way, of custodial maintenance and other contract workers who come into these buildings not knowing what they're disturbing and exposing themselves over a lifetime occupation and then reaching retirement or barely reaching retirement, only to find out that they can barely breath.

That's the fate that we doom these people to if we don't expand this model in some fashion. I'll agree that there are modifications in order. But to avoid the central question of is it right or is it necessary to identify asbestos-containing materials in public and commercial buildings, I contend that for the EPA or the OSHA or the Congress not to take that step at this point is really putting the public's health in serious jeopardy.

That's the best I can do to summarize my remarks. I'd be happy to answer any questions.

[The prepared statement of Mr. August follows:]

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Statement of

James August

on

AHERA

Before the

Subcommittee on

Environment, Energy and Natural Resources

Government Operations Committee

September 24, 1991

in the public service

I am James August, Occupational Health and Safety Specialist with the American Federation of State, County and Municipal Employees (AFSCME). Nationally, AFSCME's 1.3 members work in a wide range of job classifications primarily in state and local government, hospitals, and non-profit organizations. We represent school employees across the country, and many thousands more custodial and maintenance workers in non-school buildings.

For years, AFSCME has worked to protect our members and the general public from the hazards of asbestos. AFSCME was a member of the negotiating committee that developed the Asbestos Hazard Emergency Response Act (AHERA) regulation, and also participated in the Environmental Protection Agency's (EPA) policy dialogue on asbestos in public and commercial buildings.

AHERA is an important and necessary law that contains a logical model for addressing asbestos hazards in schools, and a similar approach needs to be extended to public and commercial buildings. Students and workers' exposure to asbestos has been reduced because of AHERA. The law requires that asbestos-containing materials (ACM) be identified and assessed for their capacity to shed fibers, workers be notified of its presence and trained in proper work practices, and that schools implement actions to prevent exposure to asbestos.

The evaluation of AHERA released last June is quite positive. There are two findings that also have particular significance concerning the issue of asbestos in public and commercial buildings. First, inspectors correctly identified nearly ninety percent of building materials that were likely to contain asbestos, and appropriately assessed nearly all of that material in terms of the condition or amount of damage. All decisions concerning asbestos management stem from the information that is collected initially during the building survey. Identification and assessment of asbestos are the two most important aspects of an inspection, and on these two counts, the performance of inspectors was very good. Areas where inspections are in need of improvement were also revealed and these are areas that can be addressed as part of required refresher training. The evaluation clearly shows that it is possible to inspect a large population of buildings.

The second finding of particular relevance to public and commercial buildings is that inspections of school buildings did not result in wholesale removal of asbestos. In most schools, asbestos was repaired, encapsulated, or otherwise managed in place through an operations and maintenance (O&M) program. Removals occurred in only sixteen percent of the school buildings with asbestos. Over ninety percent of the remediation work that involved repair, encapsulation, or removal was visually judged to be adequate.

The Report refutes the myth that has been spread by critics that AHERA would cause hysteria and result in the squandering of billions of dollars to rip out all the asbestos in our schools. Parents and employees did not panic, and school authorities did not overreact when they learned their schools contained asbestos. There is no reason to believe that the pressure to remove asbestos would be greater in commercial buildings than there has been in schools where the primary objective is to protect the health of children.

The Report also identified deficiencies in the implementation of AHERA that are consistent with problems that AFSCME members have brought to our attention. Our greatest area of concern is the adequacy of training that is provided to custodial and maintenance employees. Too often these workers have not received the length of training that is required for their actual duties. Even where custodial and maintenance employees have received the appropriate number of hours of training, the quality of the O&M instruction is often deficient. This is due in part to the lack of oversight of O&M training providers, and there is still no model O&M curriculum.

Based upon AFSCME's experience, most implementation problems are due to the financial constraints on local education authorities rather than flaws in the regulation itself. Schools often must postpone taking action on consultants' recommendations to perform removal or other remdiation due to insufficient funds. As a result, schools rely heavily on managing asbestos in place and too often try to cut corners in an effort to save money.

Recent developments at the Occupational Safety and Health Administration (OSHA) and EPA have focused attention on the applicability of AHERA to public and commercial buildings. OSHA is currently in the process of revising its asbestos standard. OSHA's proposal is an elaborate set of work practices and procedures that must be followed when asbestos is to be removed or otherwise disturbed. Underlying the entire standard is an implicit assumption that employers and their workers know when and where they will encounter asbestos, and therefore can comply with the standard's requirements. However, in all too many cases, this assumption is incorrect. With the exception of schools covered by AHERA, many buildings have not been inspected for asbestos and/or workers notified of where asbestos is located. The protections contained in the standard will not be activated unless the asbestos has been identified.

EPA recently published a guidance document that encourages building owners to manage asbestos materials in place when possible, rather than removing the material. Managing asbestos requires that the building's custodial and maintenance staff know where the material is located, and are trained to monitor its condition and respond to asbestos when it becomes damaged. In other words, EPA's advice to building owners is to adopt an asbestos management program that is modeled on AHERA. This approach should be mandated because too many building owners have not voluntarily implemented an effective asbestos management program.

A required AHERA type of program to control the hazards of asbestos is long overdue for public and commercial buildings. In 1985, EPA estimated that ACM could be found in 31,000 schools and 733,000 other public and commercial buildings. A survey undertaken three years ago in New York City indicates that the EPA estimates may be very conservative. The New York study found asbestos in sixty-eight percent of buildings, and overall, nineteen percent of the asbestos was found to be in poor condition.

The health risks of asbestos to building service workers have been clearly and repeatedly demonstrated. EPA issued the school inspection rule because it determined that the presence of unidentified asbestos and the absence of proper maintenance procedures to prevent exposure constituted an unreasonable risk of injury to school employees. In EPA's 1988 Report to Congress on asbestos in public buildings the Agency stated that building service workers were equally at risk whether they worked in public or commercial buildings or schools.

In June of last year, an international conference focused in large part on what has been termed the "Third Wave of Asbestos Disease", that which has resulted from exposure to asbestos already in place. Numerous studies showed that custodians and trades people who work around asbestos in buildings have experienced a very significant rate of asbestos-related disease and death. The exposure and subsequent disease occurred primarily because workers were not told they were disturbing asbestos and/or were not aware of or trained to take precautions when working with this potent carcinogen. Unfortunately, many workers continue to be exposed to asbestos everyday in public and commercial buildings because they have not been notified of the presence of asbestos or received proper training.

There is controversy concerning the level of risk that asbestos poses to building occupants. However, there is a consensus that the best strategy to eliminate whatever risk that exists to occupants is to ensure that building service workers who disturb asbestos are aware of its locations and are trained and equipped to prevent the uncontrolled release of asbestos fibers into the building's environment. This is the approach that is contained in AHERA.

In conclusion, AHERA has made the nation's schools much safer places for students, our members, and other occupants with respect to the hazards of asbestos. However, AFSCME is not satisfied with the situation in which the school employees we represent have better regulatory protections for asbestos than our members who work in non-school settings. Asbestos is no less of a hazard to the health of workers and the general public in public and commercial buildings. Therefore, an AHERA approach to protecting workers and occupants from asbestos should be extended to public and commercial buildings.

Thank you and I welcome any questions you may have.

Mr. SYNAR. Mr. August, let me ask you a couple questions here. First of all, you obviously were represented on the negotiation committee; correct?

Mr. AUGUST. Yes. I was there.

Mr. SYNAR. You were pretty happy with the results, overall?

Mr. AUGUST. Well, we got a decent regulation out of it, I would say that, nothing that we were totally satisfied with. But as a negotiated rulemaking in any kind of negotiation, compromises were made and I think some serious—at times health was jeopardized because of some of the compromises that had to be made in the process of reaching that consensus.

Mr. SYNAR. Now your greatest area of concern, if I read your testimony correctly, is the adequacy of the training.

Mr. AUGUST. Yes.

Mr. SYNAR. How much training is required in this?

Mr. AUGUST. How much training is——

Mr. SYNAR. How much training is required?

Mr. AUGUST. All custodial and maintenance personnel are to receive a 2-hour awareness training. If their duties require them to disturb small amounts of asbestos, they are to receive an additional 14 hours of training.

Mr. SYNAR. Who does that training?

Mr. AUGUST. That's the problem. It's not regulated. The people who do the actual ripout, the abatement people, they are required to have 24 hours of training. They must become certified. They receive that certification from accredited training providers. This was an oversight of the regulation.

Mr. SYNAR. You don't even know who pays for it?

Mr. AUGUST. Pardon?

Mr. SYNAR. Your people don't even know who to turn to to get it paid for; do you?

Mr. AUGUST. Right. The schools—it's up to the schools to find someone to come in and train their people for the 16 hour training, and it's not a required curriculum or whatever. There's no oversight of those training providers.

Mr. SYNAR. Would you say the biggest problem is not the regulations but the lack of money in the LEA's?

Mr. AUGUST. Yes. We've been trying for years to get increased funding through the ASHAA program. My experience, I get called into situations frequently where our members turn to us for help because they feel they have serious problems. The enforcement action of EPA, quite frankly, is not very quick when they call and say the school is not adequately protecting us.

Generally, when we sit down and try to discuss how we can deal with it, it's usually the case of we have a very limited pot of money here. How can we spend it best? If there were more money available, we'd have less of these discussions about how can we do what the consultants advised us to do. We just don't have enough money. So we have to get into this prioritizing how to best spend the money.

Mr. SYNAR. Have you sat through these whole hearings today?

Mr. AUGUST. Yes, I have.

Mr. SYNAR. Now, given the fact that we're about to model the commercial—you're a better man than most, I'll tell you. Given the fact of the problems that have been outlined here, and given the fact that AHERA is going to be used as kind of a model for commercial and private buildings, does that bother you?

Mr. **August**. No, it doesn't because when we talk about the model, the model is basically three things. The model is you find the material—well, it's more than three things. But the essential elements are you identify the material. I agree, we could go into some tinkering with the scope of materials that really need to be focused on.

You identify materials, you notify the people affected, and you train workers. You require that actions be taken that are going to protect the health. There's a whole range of options that you went into earlier with EPA from removal to operations and maintenance.

The point is, though, that none of those response actions will be taken unless the initial step of finding out what you've got has been accomplished. All these regulations that have been written, the NESHAP's that Ms. Fisher mentioned, the OSHA regulation, they are all built—it's like a house of cards with no foundation.

Nothing requires, except for the schools, to go out and find that we have the materials. So whether it's removal or operations and maintenance, nobody is going to take those appropriate steps unless they've identified it. It's this illogical kind of sequence that we keep getting into over and over and over again.

Mr. **Synar**. Thank you, Mr. August. I think that's been very helpful for us today. Let me conclude by saying that I think that that last statement that you made may be the best statement of really what we've learned today.

It is clear to me that Congress did not do a very good job in writing this law—in not writing the law specifically enough for laying down what we expected or required, EPA has not had the type of direction that any agency should have in trying to formulate the regulations by which to enforce the law.

That said, EPA is not guiltless in the sense that I think it's very clear today that they do not have control of this program. What concerns all of us who are involved in this area are really two things. First of all, this was the program to try to give the American public and the men and women who have children in over 100,000 schools throughout this country, the confidence that the places where their children reside most of the year are safe places.

That confidence is in question. More importantly now because that confidence is in question, as we try to expand this program into commercial and private businesses which will literally affect millions of buildings throughout this country, we cannot give the American people confidence we could run that program. I think it's imperative on the part of Congress to learn the lesson that we need to give more specific directions and requirements before we ask any agency to move forward.

Secondly, we need to direct that agency to provide the resources and the schedule by which to do it in a timely and fashionable way.

Finally, we need to have control over a program before we try to expand it. We were here 3 years ago to look at this program. We are back today. We will continue to monitor it because of the importance this program has to the lives of our children and because of the immense amount of expense that is involved.

Three billion dollars has already been spent just to meet the initial requirements of AHERA. When you include the millions of buildings that will be included on that list in the commercial and private sector, that could be literally hundreds of billions of dollars.

At a time when a nation is trying to compete and get itself ready for the decade of the 1990's in a post-cold war era, that kind of expense cannot be helpful as we try to become more competitive. I hope you'll take this hearing as a lesson to all of us that we need to work together, that we need to find solutions to the problems that we found today, and that we learn from this experience for the future.

This ends the hearing.

[Whereupon, at 1:30 p.m. the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

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October 9, 1991

Ms. Sandra Z. Harris
Staff Director
Subcommittee on Environment, Energy
and Natural Resources
Rayburn House Office Bldg., B-371
Washington, D.C. 20515-6145

Re: Statement of Hall-Kimbrell Environmental Services, Inc.
Sept. 24, 1991 Hearing on EPA's Implementation of AHERA

Dear Ms. Harris:

Enclosed please find, per your conversations with Keith Onsdorff, Esq. of Seyfarth, Shaw, Fairweather & Geraldson, a revised Statement from Hall-Kimbrell regarding the above-referenced Hearing. This Statement corrects the typographical errors that were submitted to your offices on September 23, 1991.

In addition, the Statement contains one inaccuracy that we would like to correct. On page 6, the last sentence of the fourth paragraph states: "Nonetheless, after it reviewed the 100 Questions, Hall-Kimbrell revised its inspection protocol to include all forms of wallboard." This statement is correct, but misleading. Hall-Kimbrell originally revised its inspection protocol in September 1988 to include wallboard because a few states had issued specific requirements that wallboard be included in inspections; the revisions were not made in response to the 100 Questions.

Thank you for your assistance in this matter.

Very truly yours,

KOBAYASHI & ASSOCIATES, P.C.

W Keith Tipton
for John M. Kobayashi

JMK:cn
Enclosure

STATEMENT

OF

HALL-KIMBRELL ENVIRONMENTAL SERVICES, INC.

TO THE

SUBCOMMITTEE ON ENVIRONMENT, ENERGY AND NATURAL RESOURCES

SEPTEMBER 24, 1991 HEARING ON

THE E.P.A.'s IMPLEMENTATION OF AHERA

INTRODUCTION

The EPA's record of enforcement of AHERA is one of bureaucratic ineptitude, of countless hours of futile harassment of a responsible corporate citizen, of more than the length of three school terms of "enforcement" against Hall-Kimbrell without a single case having been successfully adjudicated, indeed without a single case having been brought before a judicial officer. The reasons for this administrative failure are obvious, and demand but one response: a resounding condemnation of the EPA for its failure to carry out any of the tasks it was charged with by Congress and public vindication of those who have done no more than carry out in good faith the express requirements of AHERA.

In adopting AHERA, Congress found that asbestos exposure in the schools continued to exist despite EPA's attempts to remedy that condition over the preceding four year period. Indeed, Congress found that asbestos exposure may have increased due to the lack of federal standards. Congress also found that EPA's guidance and rules were inadequate to prevent the harm of asbestos exposure in and from the Nation's schools.

Consequently, Congress charged the EPA to adopt regulations to ensure proper identification of asbestos-containing materials. EPA has utterly failed to do so. Instead, the EPA adopted ambiguous rules which do not allow the schools and their contractors to meet their statutory duties, and then has sought to retroactively impose its interpretations of those ambiguous rules by judicial rulemaking.

Congress intended that the AHERA be used to guide the implementation of appropriate response actions in the nation's schools "in a safe and complete manner" including all reinspections. EPA has instead abused its enforcement powers to guarantee that piecemeal and incomplete reinspections shall be the rule.

Finally, EPA has attempted to hide its utter disregard for the Congressional mandate by filing citations involving millions of dollars of penalties against those who were attempting in good faith to comply with EPA's contradictory and confused guidance: Hall-Kimbrell. This is a case where EPA deserves to be held accountable for its record of abuse of power and failures to comply with Congressional mandates and intentions. Given its record, EPA stands before this Subcommittee as devoid of covering as the Emperor with his new clothes.

FACTUAL BACKGROUND

Hall-Kimbrell Environmental Services, Inc., is an asbestos engineering and analytical company, which began its work in the early 1980's. When AHERA was first promulgated, Hall-Kimbrell was well situated, because of its expertise in the field, to aid Local Education Agencies (LEAs) in complying with the statute. Consequently, Hall-Kimbrell inspected and drafted management plans for over 1300 LEAs. Now EPA is challenging Hall-Kimbrell's performance by asserting that gypsum wallboard (commonly called sheetrock and drywall) and hardwall plaster were always materials suspected to contain asbestos and that Hall-Kimbrell had not properly identified the materials as suspect.

While AHERA was signed into law on October 22, 1986, final regulations were not published by EPA until October 30, 1987. The statute and regulations required LEAs to have their schools inspected and management plans prepared no later than October 12, 1988, and to begin implementation of those management plans by July 9, 1989. As a result, a large number of inspectors were required in short order to inspect virtually every public and private school in the nation. Notwithstanding the completely foreseeable and immediate demand, EPA was very slow in certifying inspectors and management planners to perform the inspections and prepare management plans.

The primary purpose of those inspections was to identify all asbestos containing materials ("ACM") or asbestos containing building materials ("ACBM"). It is noteworthy that neither the statute nor the regulations listed gypsum wallboard (also known as sheetrock and drywall) or hardwall plaster as materials suspected to contain asbestos. EPA's guidance document regarding asbestos in effect at that time, Guidance for Controlling Asbestos-Containing Materials in Buildings, EPA 560/5-85-024 (the "Purple Book"), described cementitious, Transite-type wallboards as being ACM found in buildings, but not gypsum wallboard (and not sheetrock or drywall).

In fact, the first reference to gypsum wallboard as a suspect material appeared in an EPA publication called the "100 Commonly Asked Questions About the New AHERA Asbestos-in-Schools Rule" dated May 1988, seven months after the final regulations became effective, also known as the "100 Questions." The 100 Questions did not list hardwall plaster as a suspect material. 100 Questions was not subject to any rulemaking procedure; in fact, EPA took the position at the time that the document was an informal interpretation. There was wide disagreement with the EPA's position, including those felt and voiced by Hall-Kimbrell.

Nonetheless, by at least September 28, 1988, Hall-Kimbrell had added wallboard and hardwall plaster to the list of materials to be sampled in the protocol used by its inspectors (see 9/28/88 Protocol, Exhibit "A," at pp. 22 and 23.) However, the issue caused Hall-Kimbrell sufficient concern that in October 1989 it sent a formal request for regulatory interpretation to EPA, discussing its view of the regulations and requesting an interpretation EPA intended to support, (Exhibit "B"). EPA never responded.

When EPA introduced Managing Asbestos in Place: A Building Owner's Guide to Operations and Maintenance Programs for Asbestos Containing Materials, TS-790 (the "Green Book"), in 1990, EPA first officially took the position that gypsum wallboard was a suspect material. The Green Book was also not subject to formal rulemaking. Even then, EPA's own research team, in its June 1991 study of AHERA implementation in schools ("Evaluation of the Asbestos Hazard Emergency Response Act ("AHERA")," prepared by Westat, Inc., of Rockville, Maryland for the task manager of the Economics Technology Division of the EPA, (the "Westat Report," Exhibit "C") (at pp. 2-3, 2-5)), declined to include sheetrock, drywall, and hardwall plaster in the study because such materials "infrequently" contain asbestos but are so prevalent that it would require a "massive effort" to address them.

EPA initially focused on Hall-Kimbrell's treatment of gypsum wallboard in 1990 with the first of many baseless citations. Hall-Kimbrell responded by meeting with EPA and attempting an amicable resolution of the matter in a fashion most likely to help the affected LEAs. Hall-Kimbrell was in the meantime acquired by Professional Service Industries, Inc. ("PSI"). Additional meetings occurred over a period of more than a year. During that time, Hall-Kimbrell accepted a number of EPA's settlement proposals, but EPA invariably demanded additional concessions.

One of the major problems with resolving the dispute was that EPA refused to specify or develop a protocol for sampling wallboard and hardwall plaster. Additionally, EPA would not commit to accepting reinspection and rework on just gypsum wallboard and hardwall plaster, but instead, EPA wanted complete reinspection and rework of all inspections.[1] EPA also demanded, in effect, a $10,000,000.00 guaranteed fund for such work. Despite EPA's continually changing and blatantly overreaching demands, Hall-

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[1] While the settlement negotiations were proceeding, EPA periodically filed additional citations against Hall-Kimbrell. Some of the citations also appear to address concerns about the format of the management plans prepared by Hall-Kimbrell, although those complaints do not address whether the material included in the plans is itself deficient. EPA also subpoenaed documents from Hall-Kimbrell several times. Hall-Kimbrell always responded promptly and cooperatively, despite the fact that EPA sometimes subpoenaed documents it had already received, but had lost. EPA served Hall-Kimbrell with another subpoena for documents, dated September 6, 1991, on September 9, 1991, demanding production on September 12, 1991. Hall-Kimbrell is in the process of responding to that subpoena.

Kimbrell continued its best good faith efforts in, settlement negotiations to resolve the matter.

Immediately thereafter, on August 21, 1991, EPA sent a letter (Exhibit "D") to 6,500 LEAs to the attention of school principals and superintendents, telling them that their management plans, if prepared by Hall-Kimbrell, a division of PSI, (Exhibit "D," p.3) might be deficient and that the LEA would be liable for the deficiency. EPA knowingly sent the letter to substantially more LEAs than those for whom Hall-Kimbrell prepared management plans. While the letter referenced plans prepared by Hall-Kimbrell, a division of PSI, nothing in it indicated that the focus of EPA's concern was plans prepared by Hall-Kimbrell before it was acquired by PSI. The letter urged the LEAs to demand that Hall-Kimbrell redo the plans at no expense to the LEA and to discuss the alleged deficiencies with the LEA's legal counsel. The letter also included a questionnaire about the management plans, which EPA requested each school to fill out and return. In effect, EPA used its position of power to convince LEAs that they should file a report of any deficiencies in their management plans, for which the LEA could be liable. This requirement, beguilingly phrased as a "request" imposes a requirement that is not founded in the statute or regulations. After sending the letter, filing additional citations and issuing numerous press releases, and threatening PSI with debarment from all federal contracting, basically a death threat, EPA asked Hall-Kimbrell to continue settlement negotiations. It is also important to note that in the press releases it has issued, EPA has implicated both PSI and Hall-Kimbrell, even though only management plans prepared by Hall-Kimbrell before it was acquired by PSI are at issue.

I. THE STATUTE AND REGULATIONS ARE AMBIGUOUS WITH RESPECT TO TREATMENT OF GYPSUM DRYWALL AND HARDWALL PLASTER AS ACM.

EPA citations against Hall-Kimbrell focus heavily on two allegedly suspect materials: sheetrock/drywall (gypsum wallboard) and hardwall plaster. Hall-Kimbrell has challenged the citations because, among other things, AHERA and the AHERA regulations by EPA are vague and ambiguous and do not adequately give notice that these materials are to be treated as suspect for purposes of AHERA.

In passing AHERA, Congress found that existing EPA rules, specifically the 1982 school inspection rule and the 1985 Guidance for Controlling Asbestos-Containing Material in Buildings, did not contain "standards for the proper identification of asbestos-containing material." As a result, Congress specifically directed EPA to establish federal regulations to ensure proper identification of asbestos-containing materials and to guide the implementation of appropriate response actions in the nation's schools "in a safe and complete manner."

When EPA promulgated its final AHERA regulations on October 30, 1987, the regulations did not mention sheetrock, drywall, gypsum wallboard or hardwall plaster as ACM. Indeed, the regulations did not define "suspect"; they merely said that an AHERA inspector must identify the locations of all suspected ACBM. 40 C.F.R. § 763.85(a)(4)(i).

At the time of promulgation, EPA's Purple Book identified "wallboard" as a material in which asbestos "may be found" (see p. 1). However, Appendix A to the Purple Book made it clear that it was referring to wallboard which contained asbestos in the 30-50% range, percentages not found in the type of gypsum wallboard usually referred to as sheetrock or drywall. Rather, the reference is clearly to Transite or Transite-type wallboard, a cementitious asbestos containing wallboard. Indeed, the Purple Book even recommended that drywall ("gypsum panels") be used to enclose ACM in certain response actions. Similarly, the Purple Book noted that asbestos "may be found" in "plaster/stucco," but once again defines this material in terms of its asbestos content (2-10%).

In the regulations, EPA defined "miscellaneous materials," the only possible category that might include gypsum wallboard, as "interior building materials on structural components, structural members or fixtures, such as floor and ceiling tiles, and does not include surfacing material or other thermal system insulation." 40 C.F.R. § 763.83. Gypsum wallboard and hardwall plaster are not encompassed within this definition by any logical necessity. Further, EPA defined "surfacing materials" as "material in a school building that is sprayed on, trowelled on, or otherwise applied to surfaces, such as acoustical plaster on ceilings and fireproofing materials on structural members, or other materials on surfaces for acoustical, fireproofing or other purposes." 40 C.F.R. § 763.83. The use of acoustical plaster as an example, rather than plaster, can be read to exclude other types of plaster, like hardwall plaster. More importantly, hardwall plaster is not truly a surfacing material; it is a wall system that was gradually replaced by the less expensive and more efficient gypsum wallboard.

On February 13, 1990, EPA, as required by law, published a list of former and current manufacturers and processors of certain asbestos containing products, along with summaries of information provided by the manufacturers about their products. 55 Fed. Reg. 5144 (February 13, 1990). No gypsum wallboard products were listed as having > 1% asbestos, although some of the manufacturers providing information manufactured gypsum wallboard products. The logical inference is that they were not asbestos containing.

Because EPA elected not to define the term "suspect," most people concluded that this issue would be addressed through the training process by having accredited inspectors trained to make sound professional judgments as to which materials were suspect and which were not. It has been Hall-Kimbrell's experience that most trained and experienced inspectors -- as well as most knowledgeable LEAs -- do not believe that gypsum wallboard should be considered a suspect material. Indeed, EPA approved Hall-Kimbrell's own training courses, even though the courses originally did not train inspectors to identify sheetrock/drywall as a suspect material.

Shortly after the final AHERA rules were promulgated, Hall-Kimbrell arranged for the EPA Region VII Asbestos Coordinator to give a two-hour presentation to its personnel concerning implementation of the new regulations. The Asbestos Coordinator noted in his presentation that the new AHERA rules were not cut and dried and there was room for interpretation by inspectors. Later in the presentation he pointed to the drywall in the conference room and noted "you would not suspect that of containing asbestos." He went on to state that inspectors should be looking for things that would commonly be suspected of containing asbestos in schools.

The notion that identification of suspect materials should rely on the judgment of trained inspectors was in fact confirmed as late as mid-1990 when a Hall-Kimbrell representative contacted the Asbestos Technical Advisor in EPA Region VI. That technical advisor stated that it was not Region VI policy that gypsum wallboard be treated as suspect ACM, but that inspectors must use their expertise in determining whether wallboard being inspected should be considered suspect.

Then EPA created additional confusion when it released the "100 Questions" in May 1988. In answer to question #38, EPA provided a list of materials which included those "classified as . . . suspected ACBM for purposes of the rule." This list identified "wallboard" as suspected ACBM, regardless of what material the wallboard was constructed. Hall-Kimbrell, along with many other knowledgeable experts in the field, was surprised by this listing since it was generally recognized that gypsum wallboard rarely, if ever, contained asbestos in amounts sufficient to meet the definition of ACM. Nonetheless, after it reviewed the 100 Questions, Hall-Kimbrell revised its inspection protocol to include all forms of wallboard.

The confusion engendered by EPA on this issue is well illustrated by the Model EPA Curriculum for Training Building Inspectors for accreditation under TSCA § 206, which was developed under the sponsorship of EPA by Environmental Sciences, Inc., and the Georgia Institute of Technology, (Exhibit "E"). The Student Notebook prepared for the model curriculum illustrates the level of ambiguity that still exists within EPA on this issue. Although the 100 Questions is attached as an appendix, the Student Notebook itself still displays substantial variation in defining what is included in "miscellaneous materials" and "suspect miscellaneous materials." For example, in Section O (Summaries) the only reference to the use of asbestos in building materials such as wallboard is "wallboard (now banned)." However, sheetrock/drywall is a form of wallboard which is not banned. Later, Section O identifies AHERA categories of miscellaneous building materials which include floor tile, ceiling tile, concrete pipe, fabrics, and outdoor siding -- but not sheetrock/drywall or even asbestos/cement wallboard (sometimes called Transite or Transite-type wallboard). Later in Section O there is a description of specific AHERA inspection requirements in which inspectors are instructed to "suspect ACM on all miscellaneous materials such as lay-in ceiling tiles, floor tiles, and Transite wallboard." Non-Transite forms of wallboard, such as sheetrock/drywall are not included.

It appears that the persons formulating the answers to the 100 Questions may have decided to include sheetrock/drywall (or gypsum wallboard) as a suspect material because they thought it might be difficult for an inspector to tell the difference between non-asbestos containing sheetrock/drywall and asbestos containing Transite or Transite-type wallboard. If this is the case, then this decision has imposed unnecessary extra costs on LEAs and their inspectors since, as was noted in Section I of the Student Notebook, "Transite (or Transite-type) wallboard can easily be identified." See p. I-5.

More significant, however, is Section E to the Student Notebook, which includes a list of "suspected" materials as Exhibit E-6. The list includes "cement asbestos wallboard," but does not include sheetrock/drywall or any other type of non-asbestos containing wallboard. The list also includes "acoustical or decorative" plaster, but not hardwall plaster.

Even more illuminating is Exhibit E-8. There the Student Notebook lists various types of materials which are "substitutes" for their asbestos containing counterparts. For example, Section III of Exhibit E-8 lists "Substitute Materials for Asbestos-Containing Panels or Wallboard." Among the "substitute materials" listed are such things as wood fiber, glass fiber, treated cotton, polystyrene foam, and -- you guessed it -- gypsum.

Although Exhibit E-8 appears on its face to list products which are substitutes for asbestos-containing products, the text of Student Notebook Section E confuses the issue further by stating: "Exhibit E-8 identifies trade names of materials that are known or have been inferred to contain asbestos." See p. E-10. This is a remarkable statement in view of public documents published by EPA concerning asbestos.

For example, the AHERA regulations themselves identify fiberglass and foam glass as "non-ACBM." See 40 C.F.R. § 763.88(b)(4). Indeed, Answer #38 in the 100 Questions lists "glass" generically as a non-suspect material. Since Exhibit E-8 contains numerous references to fiberglass and foam glass as "substitute" materials, it is confusing as to why a Student Notebook prepared under the auspices of EPA would identify those products as "materials that are known or have been inferred to contain asbestos." Exhibit E-8 even contains references to substitute materials such as "non-asbestos fiber" and "non-asbestos mineral," which EPA concludes for some reason are known to or have been inferred to contain asbestos. Exhibit E-8 also identifies a wallboard made of "wood fiber," even though Answer #38 in the 100 Questions lists "pressed wood" among the materials that are not suspect under AHERA.

The interpretation given to Exhibit E-8 in the Student Notebook also appears to be inconsistent with information gathered by EPA as required by the Asbestos Information Act of 1988. Pursuant to the requirements of that Act, EPA issued a Federal Register Notice (54 Fed. Reg. 15622, April 18, 1989) which notified former and current manufacturers and processors of asbestos products to submit information identifying their products to EPA. Also, pursuant to the Asbestos Information Act of 1988, EPA organized and published summaries of the submitted information on February 13, 1990. See 55 Fed. Reg. 5144.

Many of the manufacturers listed on Exhibit E-8 apparently did not agree with the Student Notebook's conclusion that their products are known to or have been inferred to contain asbestos, since, according to EPA's February 13, 1990 Notice, they did not identify themselves to EPA as manufacturers and processors of asbestos products. Even those manufacturers listed in Exhibit E-8 who did submit information did not identify the products listed on Exhibit E-8 as products containing asbestos. For example, Exhibit E-8 indicates that Georgia Pacific Corporation manufactured a gypsum wallboard under the trade name "Bestwell" (p. E-24). However, Georgia Pacific did not report Bestwell gypsum wallboard as a product manufactured with asbestos. See 55 Fed. Reg. at 5149-50. Similarly, Exhibit E-8 lists "Cal-Shake," a calcium silicate wallboard, produced by the U.S. Gypsum Company. However, the summary of asbestos containing materials manufactured by U.S. Gypsum Company which runs to four columns in the Federal Register Notice, contains no mention of Cal-Shake, or indeed of any wallboard product whatsoever. See 55 Fed. Reg. at 5158-60.

Because of the confusion and uncertainty generated by the 100 Questions, in late 1989 Hall-Kimbrell sought formal guidance from EPA by submitting a presentation designed to show that gypsum wall systems should not be considered suspect ACM. EPA, however, refused to respond to this request for guidance -- except by filing citations against Hall-Kimbrell based on EPA's allegations that Hall-Kimbrell failed to identify sheetrock/drywall and hardwall plaster as suspect materials. In fact, EPA continued to refuse to respond even after the Honorable Representative for the 2nd District of Kansas sent a letter to William K. Reilly requesting the EPA's position concerning the need to test sheetrock in school buildings for asbestos-containing materials because of EPA's failure to respond to Hall-Kimbrell. Hall-Kimbrell and PSI have no basis to believe that EPA responded even to the Representative.

But even as these complaints were being filed against Hall-Kimbrell, EPA's position on the issues of both sheetrock/drywall and hardwall plaster was shifting yet again. When EPA finally got around to taking a stab at defining the term "suspect materials," it was in the Westat Report (Exhibit "C"). There, EPA's technical experts defined suspect materials as materials that are "suspected of containing asbestos because, before 1980, they were frequently manufactured using asbestos." See p. 3-1. Even though the focus of the Westat Report was to evaluate how well the original AHERA inspections identified, assessed, described, and quantified suspect materials (see p. xxiv), the research team decided to exclude sheetrock/drywall and hardwall plaster from the study because such materials "infrequently contain asbestos and are present in such large quantities that a massive effort would be needed to assess them, while providing little information to the study." See p. 2-3.

Similarly, in July 1990, EPA issued a report titled, "Managing Asbestos in Place: A Building Owners' Guide to Operations and Maintenance Programs for Asbestos Containing Materials" (the "Green Book"). Appendix G to the Green Book contains a sample list of suspect asbestos containing materials which is intended as a general guide to show which types of materials may contain asbestos. The list includes, "acoustical plaster" and "decorative plaster," but excludes hardwall plaster, implying that this type of plaster is no longer considered suspect. On the other hand, the list includes both "cement wallboard" and "wallboard" indicating that EPA still intends to include as suspect ACBM wallboard made from such materials as fiberglass, foam glass and wood -- materials which have been specifically excluded in other EPA documents, such as the Westat Report.

To say that EPA's standard on wallboard is confused, contradictory and conflicting is an understatement. To say that application of this "standard" to Hall-Kimbrell deprives it of due process is not. Indeed, the United States Court of Appeals for the D.C. Circuit has already criticized the EPA for similar ambiguity in another regulation, stating "[n]o reasonable reader of this provision could have known that EPA's current construction is what the agency originally must have had in mind." Rollins Environmental Services (N.J.), Inc. v. EPA, (July 5, 1991).

II. IT IS POOR POLICY FOR EPA TO RULEMAKE BY SELECTIVE ENFORCEMENT

While the statute and regulations do not address the materials at issue, EPA has apparently determined that it wishes the materials retroactively to be considered suspect and treated accordingly. However, EPA has not manifested this decision in any rulemaking proceeding, but rather, at least in the case of gypsum wallboard, apparently intends to regulate by listing it as a suspect material in the 100 Questions and the Green Book. Any such intention is directly contrary to AHERA which specifically requires that any change to the Purple Book be made only by formal rulemaking and the change must protect human health and the environment. 15 U.S.C. § 2643(k). It has also manifested its decision retroactively to make gypsum wallboard and hardwall plaster suspect by filing citations against Hall-Kimbrell.

If EPA seeks to ensure maximum compliance with AHERA, then it would make more sense to promulgate a regulation deeming the materials suspect. It is easy to understand, however, why EPA wants to avoid formal rulemaking. First, EPA would be required to provide a scientific basis for its position, something that would be difficult to do. Also, EPA would be required to solicit and consider public comment on its position, most of which would likely be unfavorable. Finally, in a rulemaking, EPA would have to give a reasonable estimate of the economic impact of considering the materials to be suspect materials for the purposes of AHERA. The estimate would not be politically palatable for the EPA.

As already noted, in the Westat Report, an EPA research team acknowledged that materials such as sheetrock/drywall and hardwall plaster would require a massive effort for assessment. See pp. 2-3. If EPA undertook formal rulemaking, which would require it to update its economic impact analysis, schools and the taxpaying public would have a realistic idea of the cost involved in treating these materials as suspect for purposes of AHERA. It is doubtful that the original economic impact analysis considered these matters because the preamble to the final AHERA rule expresses concern about such non-friable ACBM as "floor tile, Transite board and fire doors," but not the much broader and all-inclusive category of "wallboard" which it now characterizes as "suspect." See 52 Fed. Reg. at 41845. In fact one of the original purposes behind AHERA was to guide schools in choosing cost effective responses to asbestos. As Congress stated in its findings and purpose:

> As a result of the lack of regulatory guidance from the Environmental Protection Agency, some schools have not undertaken response action while many others have undertaken expensive

> projects without knowing if their action is necessary, adequate, or safe.

15 U.S.C. § 2641. EPA, in its befuddled handling of wallboard and hardwall plaster under AHERA has maintained a problem AHERA was meant to correct. It is difficult to understand why EPA has now become so insensitive to the cost issue because, during the original negotiated rulemaking for AHERA, it sought to avoid imposing unnecessary financial burdens on LEAs. For example, EPA decided to allow accredited inspectors not to sample homogeneous areas of thermal system insulation if the inspector determined that such insulation was "fiberglass, foam glass, rubber, or other non-ACBM." See 40 C.F.R. § 763.88(b)(4). The reason? "This will be less financially burdensome to the LEA." See February 4, 1987, Preliminary Draft, p. 23. Now, in a time of teacher layoffs, budget shortfalls and increases in class sizes, spending our schools' tax money to gain an ever diminishing amount of protection for students is understandably an issue EPA is reluctant to openly address. In that vein, it is interesting that EPA is willing to broadcast its position regarding Hall-Kimbrell in numerous press releases, but when faced with the requirement to testify truthfully before this Subcommittee, EPA requested an executive session. EPA's selective enforcement against Hall-Kimbrell penalizes the very institutions and individuals who were to have received the most benefit under AHERA.

Finally, the type of second guessing of inspector judgment in which EPA is engaging through its citations against Hall-Kimbrell defeats the purpose of having accredited inspectors. AHERA and its regulations require that inspectors and management planners receive EPA approved training and be certified before they inspect schools and prepare management plans. If EPA is going to second guess every judgment made by these trained professionals based on their training and experience, the certification program serves no purpose and can give schools and parents no comfort.

III. EPA HAS USED SELECTIVE ENFORCEMENT TO ATTEMPT TO FORCE SETTLEMENTS THAT WOULD HAVE LITTLE BENEFIT FOR SCHOOL CHILDREN BUT ENORMOUS PUBLICITY BENEFIT FOR EPA

The timing of the citations issued by EPA against Hall-Kimbrell during ongoing settlement negotiations can only lead to the conclusion that EPA filed the citations to force Hall-Kimbrell to cave in to the demands made by EPA in settlement "negotiations" and to improve EPA's posture in these hearings. Hall-Kimbrell has, in good faith, negotiated with EPA for over a year to try to settle this matter.

From a public policy perspective, it makes sense for EPA to work with Hall-Kimbrell to obtain whatever will afford the most effective and efficient protection for school children. In fact, Hall-Kimbrell was willing to do far more. However, EPA apparently assumed that because Hall-Kimbrell was willing to cooperate, it was an easy target and EPA could score a large publicity coup by forcing Hall-Kimbrell to capitulate to EPA's excessive and unreasonable demands. In making that assessment, EPA forgot one critical fact -- the LEAs, not Hall-Kimbrell, are ultimately liable for their AHERA management plans. If EPA pushed Hall-Kimbrell to the limit and bankrupted it, or if a court or ALJ determined that only LEAs can be held liable for their plans, the LEAs would be faced with a decision that would force them to spend incredible amounts of money to obtain little benefit.

Further, EPA itself does not have unlimited enforcement funds. It seems contrary to sound public policy to expend limited enforcement resources on the sheetrock/drywall and hardwall plaster issues, given its limited benefit to the health of school children, instead of pursuing the 38% error rate in inspections nationwide -- which does not include gypsum wallboard and hardwall plaster -- identified in EPA's Westat Report. A national error rate of 38%, which does not include an assessment of whether gypsum wallboard and hardwall plaster were properly sampled or identified, has much graver implications for the health of students than does the gypsum wallboard and hardwall plaster debate.

IV. EPA IS ATTEMPTING TO IMPOSE SANCTIONS WITHOUT HAVING ITS CHARGES ADJUDICATED, THEREBY DEPRIVING HALL-KIMBRELL OF DUE PROCESS AND ECONOMIC SURVIVAL

EPA has filed a number of citations against Hall-Kimbrell which seek civil penalties against Hall-Kimbrell. Ordinarily, Hall-Kimbrell would have the right to request hearings on each of the citations. EPA would then be required to prove its assertions and Hall-Kimbrell would be allowed to put on a defense. Judicial review would also be available. EPA, however, is attempting to bypass this process.

In July, 1991, Hall-Kimbrell provided a complete list of the approximately 1300 LEAs for whom Hall-Kimbrell had performed inspections and prepared management plans. Even though EPA knew the exact identities of the approximately 1300 LEAs for whom Hall-Kimbrell prepared management plans, in the EPA's August 21, 1991, letter to approximately 6,500 LEAs' school superintendents and principals, (Exhibit "D"), Mr. Michael M. Stahl, Director of EPA's Office of Compliance Monitoring, reported that EPA had initiated legal proceedings against Hall-Kimbrell which allege that materials containing asbestos or potentially containing asbestos were missed by Hall-Kimbrell in its inspections of various school buildings.

Included were such materials as "wall and ceiling plaster, wallboard, vinyl floor tile, ceiling board, friable sprayed on wall and ceiling acoustical material and related substances." The EPA could have no possible legitimate purpose for sending the letter to so many LEAs who did not have Hall-Kimbrell management plans. Although EPA had apparently not specifically checked any of the management plans of the 6,500 superintendents and school principals who received the letters, it nonetheless urged them to demand that Hall-Kimbrell conduct new inspections and revise management plans for their schools. The letter further encouraged them to request that Hall-Kimbrell conduct these reinspections at no cost to the LEAs and urged them to consult legal counsel concerning "legal remedies that you may have with respect to Hall-Kimbrell." To Hall-Kimbrell's knowledge, EPA has not taken this draconian approach in its dealings with any other AHERA contractor. EPA's subsequent press releases on the issue not only identified Hall-Kimbrell as the culprit, but also PSI.

However, while EPA's legal staff has engaged in this nationwide ambulance chasing to stir up litigation against Hall-Kimbrell, its publicly announced tack with respect to other contractors is quite the contrary. In a July 1991 EPA document titled "Asbestos in Schools: Evaluation of the Asbestos Hazardous Emergency Response Act (AHERA): A Fact Sheet" (the "Fact Sheet," Exhibit "F"), which was distributed to LEAs nationwide, the EPA acknowledged that the failure to identify suspect materials during AHERA building inspections was a significant problem nationwide. The Fact Sheet noted that the Westat Report had concluded that 82% of the school buildings inspected under AHERA had at least one suspect material unidentified and 38% of the inspections were either deficient or seriously deficient. These error rates do not include failure to identify gypsum wallboard or hardwall plaster.

Yet, even though EPA's enforcement action against Hall-Kimbrell focuses heavily on allegations that Hall-Kimbrell missed or failed to identify wallboard as a suspect material during inspections, the Fact Sheet acknowledges that wallboard was "often missed" in the initial nationwide AHERA inspections. But, in the Fact Sheet, the EPA does not suggest that the LEAs address this and other problems uncovered in the Westat Report by demanding that their original contractor reinspect the school and correct any deficiencies at no cost to the LEA. Nor does the Fact Sheet encourage LEAs to consult legal counsel and institute legal action against the other contractors. No -- only Hall-Kimbrell has been selected by EPA for this special treatment.

In dealing with the remaining universe of LEAs and AHERA contractors, the EPA manages to come up with a common sense approach of allowing any deficiencies to be identified and corrected in the upcoming triennial reinspections required for all schools by July 9, 1992. Ironically, during settlement negotiations with EPA, Hall-Kimbrell repeatedly suggested this common sense and cost effective approach to dealing with any deficiencies that may be found in the inspections and management plans prepared by its accredited personnel. EPA repeatedly rejected this proposal.

Technically, based on schools EPA has identified as having deficient management plans prepared by Hall-Kimbrell, its performance has been substantially better than the national average. Shortly after the Westat Report was issued, EPA Region VII filed three actions against Hall-Kimbrell which alleged that it had overlooked certain suspect materials in its inspections of school districts in Kansas. Although the citations allege that Hall-Kimbrell missed a total of 20 suspect materials, the management plans prepared by Hall-Kimbrell for those three school districts show that it identified 778 items of suspect ACBM. Even assuming that EPA's allegations are 100% correct, it shows that Hall-Kimbrell only missed 2.5% of the total suspect materials, a performance which is far superior to the national average of 30% determined by EPA itself. See Exhibit "C", p. 3-12.

At about the same time, EPA Region IX filed citations against Hall-Kimbrell involving five school districts in California and Arizona. Out of more than 250 school buildings in those five school districts, the EPA complaints allege that its inspectors were able to find only two buildings where Hall-Kimbrell inspectors allegedly missed suspect materials, and then only one suspect material in each building. Based on a review of the management plans prepared for these school districts, EPA's allegations, even if proven, would show that Hall-Kimbrell missed only an infinitesimal percentage of the suspect materials involved.

When one considers how substantially Hall-Kimbrell inspectors have outperformed the industry in these school districts where EPA has seen fit to file complaints, one can fairly wonder why EPA has chosen to focus its limited enforcement resources on a nationwide campaign to trash what appears to be one of the best companies in the business. In its unseemly rush to prosecute Hall-Kimbrell, EPA has even filed actions without bothering to verify that there was a factual basis for the allegations. In August 1991, EPA Region V filed a complaint against Hall-Kimbrell in which it alleged that Hall-Kimbrell had "failed to identify hard plaster and gypsum wallboard as homogeneous areas of suspect ACBM" in 162 schools in Michigan. However, EPA Region V subsequently provided Hall-Kimbrell with a copy of its September 24-28, 1990 inspection report which forms the basis for the complaint. This report shows that EPA inspectors did not "conduct any walk-through inspections of the schools." See Inspection Report, p. 2. In short, EPA filed complaints against Hall-Kimbrell without first verifying that any of the schools actually contained any hard plaster or gypsum wallboard.

In effect, the August 21, 1991 letter sent by EPA, and its subsequent press releases, lead the LEAs to believe that Hall-Kimbrell and PSI have been tried and found guilty of EPA's accusations. The letter and press releases are also designed to cause panic among LEAs and parents of school children by noting that the LEAs are liable. EPA can only have intended that Hall-Kimbrell be besieged with demands for new inspections and potentially with law suits over inspections it performed and management plans it prepared. Dealing with the demands has been and will continue to be extremely expensive for Hall-Kimbrell.

At the same time that EPA sent the notice to the LEAs, it served a very broad and burdensome subpoena on Hall-Kimbrell. Hall-Kimbrell is diligently working to provide EPA with the relevant information requested. Whether or not it was intentional, the timing of the subpoena has certainly had the effect of interfering with Hall-Kimbrell's ability to respond to requests from LEAs occasioned by the notice and press releases.

Further, the notice was intentionally sent to schools for whom Hall-Kimbrell had not prepared management plans and the press releases are nationwide. With triennial inspections imminent for most schools, EPA has effectively debarred Hall-Kimbrell and PSI from obtaining any of the triennial inspection business. In effect, EPA has managed to force Hall-Kimbrell and PSI to pay penalties without ever having had to prove a violation of the law or to rebut Hall-Kimbrell's defenses.

Hall-Kimbrell believes that the appropriate way to approach the whole issue is for it and EPA to work together to settle their differences in the most efficient and effective manner without causing any panic among the LEAs. To the contrary, the August 21 letter and press releases seem to indicate that EPA believes that it is in the public interest to cause panic among LEAs and parents of school children in order to punish Hall-Kimbrell for their perceived sins. This can hardly benefit anyone.

ISBN 0-16-038335-8

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